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United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of the Petition of the
ALASKA STEAMSHIP COMPANY,
a corporation, owner of the Steamship
"VICTORIA," an American Vessel,
for Limitation of Liability,
Petitioner and Appellee,

C. L. ANDERSON and Forty-two Others,
Claimants and Appellants.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEE

LAWRENCE BOGLE,
CASSIUS E. GATES,

Proctors for Appellee.

FILED
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F. D. MONCKTON



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BRIEF OF APPELLEE

This proceeding was commenced by the Alaska Steamship Company, owner of the steamship "Victoria," for limiting its liability, if any, on account of any loss, damage or injury arising on voyage 140 of said steamship "Victoria" from Nome, Alaska, to Seattle, Washington.

In its petition for limitation of, and exemption from, liability the said Alaska Steamship Company, appellee herein, alleged that it was the owner and operator of the steamship "Victoria"; that said vessel sailed from the port of Nome, Alaska, on August 22, 1924; and after touching at various way ports, arrived at Seattle, Washington, on September 4, 1924; that at the time of leaving Nome, Alaska, it had on board 56 steerage passengers; that she thereafter called at Dutch Harbor on August 25th, taking on passengers, called at Akutan on the same date, taking on cargo and additional passengers, called at False Pass on August 26th, took on cargo and additional passengers, called at Seward, Alaska, where she took on cargo, ship's supplies and additional passengers, and on August 30th called at Latouche, Alaska, taking on additional passengers, called at Drier Bay on said August 30th and took on additional cargo and passengers, and sailed thence to the Port of Seattle; that at the time of leaving Drier Bay she had 342 passengers, of whom 190 were steerage passengers. That on September 5, 1925, 42 persons claiming to have been steerage passengers on said vessel on said voyage filed a demand with the petitioner, Alaska Steamship Company, for \$250.00 each for alleged breach of contract of carriage on said voyage (Ap. p. 2); and that thereafter 30 of said persons, who had filed such demand, commenced separate actions against the said Alaska Steamship Company in the State Court claiming damages in the sum of \$1000.00 each for alleged

breach of contract of carriage; that 12 additional suits were threatened claiming damages in the sum of \$1000.00 each, and that if any liability existed for or on account of breach of contract on said voyage that the total of such claims would far exceed the value of the said steamer and her pending freight at the termination of said voyage (Ap. p. 5). The said petition, while denying any breach of contract on the said voyage of said vessel, alleged that if such breach did occur, or any other damage was done on said voyage, that the same was without the privity and knowledge of the Petitioner, and Petitioner sought the benefits of the Limitation of Liability Statutes of the United States. The petitioner claiming both an exemption from, or in the alternative, a limitation of, liability, prayed for the appointment of appraisers and for the issuance of other processes as in such cases provided.

After due notice to the attorney for the Plaintiffs in the suits pending in the State court, the lower court appointed three appraisers to appraise the value of said steamship "Victoria" and her pending freight at the termination of said voyage, and such appraisement was duly returned, fixing the value of said vessel and her pending freight at \$79,820.61. A bond for said amount was subsequently approved and filed, and an order entered restraining the further prosecution of the State court actions; ordering that due notice be given and claims filed with the Hon. A. C. Bowman, U. S. Com-

missioner, on or before November 1, 1924 (Ap. p. 12).

On or before said date 43 claims for \$1000.00 each were filed with the U. S. Commissioner for alleged breach of contract of carriage and one claim was filed for alleged personal injury sustained on the aforesaid voyage. In due time objections and exceptions were filed by the Petitioner to each of said claims; and thereafter on April 23, 1925, the cause being at issue, an order was entered referring the same to the Hon. A. C. Bowman, U. S. Commissioner, for the taking of testimony, with directions to return the same together with the said Commissioner's Findings of Fact and Conclusions of Law. In pursuance of said order of reference voluminous testimony was taken on behalf of the parties thereto and on July 15, 1926, the Commissioner returned the same together with his Findings of Fact and Conclusions of Law to the lower court. The Commissioner found:

“Paragraph 3 of the Amended Answer and claims sets forth the terms of the contract of carriage claimed to have been entered into between the claimants and the Petitioner for the voyage in question.

I find no testimony in the record to support the contract above mentioned, and the testimony offered in the case must be considered as applying to the duty imposed on a common carrier of passengers to the claimants.

I find from the testimony in the case that

the several claimants purchased from the agent of the Petitioner at Nome, Alaska, tickets for the passage from Nome to Seattle, on the steamship Victoria which sailed from Nome bound for Seattle, on August 22, 1924. That these tickets cost the claimants fifty dollars each and bore the legend 'Good for one STEERAGE passage as indicated'. These tickets were accepted by the officers of the steamship Victoria, and the holders of the tickets were assigned quarters in the steerage department of the vessel, where standee bunks were arranged; the claimants selecting their bunks as they came aboard.

That No. 1 steerage had accommodations for 72 passengers, and at the time the Victoria left Nome on the voyage in question there were 56 steerage passengers on board, among whom were the claimants in this case.

After leaving Nome the Victoria touched at several way-ports where additional steerage passengers were picked up, to the number of 134, making the total number of steerage passengers 190, 102 of whom were Orientals.

The evidence shows that the vessel had authority from the Local Inspectors to carry 284 steerage passengers in Nos. 1 and 2 steerage departments.

That each of the claimants had made the voyage north from Seattle to Nome in the steerage of the Victoria in the spring of the year 1924, and that there were a greater number of passengers in the steerage at that time than on the return trip in August, 1924. Further, that a number of the claimants had made trips to Alaska and return, in the steerage of the Victoria, for many years.

The claimants made the voyage to Alaska for the purpose of prospecting as miners or as

wage earners; a number of them being under contract to work for the Hammond Mining Company located at Nome.

Due to a strike of employees of the Hammond Mining Company participated in by some of the claimants and other of the claimants affected by the closing down of operations of the company, returned to Seattle on the Victoria on the voyage in question.

In support of their claims for damages, the claimants in their testimony specify certain conditions which they claim existed on the vessel during the voyage, namely:

(1) That the food was not fit for human consumption and that they were unable to eat it, and were forced to go hungry or purchase food from under-stewards or waiters;

(2) That the steerage was not properly ventilated, causing headache and other disagreeable reactions;

(3) That the steerage was not kept clean; vomit from seasick passengers not being promptly removed, causing offensive odors to permeate the steerage;

(4) That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health;

(5) That gambling was allowed to be carried on in the dining room (on the deck above the steerage), during the day time and night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night.

It does not appear from the testimony that the claimants or any one of them complained to the captain or other deck officer about the

above mentioned conditions, or asked that they be remedied. It appears clearly from the testimony that the master of the vessel and other deck officers made inspection visits to the steerage at least once each day.

I find from the testimony presented, that

(1) The Victoria was staunch, properly manned, equipped and victualed for the voyage in question;

(2) The food of the first class passengers, officers, crew and steerage was of the same quality (with the exception that the coffee of the crew and steerage was of a lesser grade), and cooked at the same time and in the same vessels;

(3) Owing to the limited capacity of the dining room, it was not possible to seat all the steerage passengers at one time, and several seatings had to be made;

(4) It was a matter for the passengers to decide who was served first or otherwise;

(5) The food was served "family style," and the passengers helped themselves.

I find from the testimony that the ventilation of the steerage of the Victoria was not other or different than had been in use on prior voyages of the Victoria; that the hatches were open whenever the weather permitted, in addition to the customary deck ventilators.

I further find that the steerage passengers were not limited in their movements about the various decks of the vessel; that many of them used the smoking and lounging room of the first class passengers, without objection on the part of the officers of the ship."

With reference to the personal injury claim filed by the Claimant, Jack Miles, the Commissioner found:

“The claimant Jack Miles in his amended answer and claim asks for damages for breach of the contract of carriage and also for personal injury during the voyage.

I find from the testimony that during the voyage the claimant Jack Miles was employed by the officers of the vessel to assist in stowing certain cargo taken on at way ports. That during the process of stowing certain barrels in one of the after holds, Miles with two other men similarly employed rolled one of the barrels to its proper place, leaving it for another man to block in position; that he turned and walked toward the opening of the hatch to help care for other cargo coming in; that the barrel which he had just left rolled and struck his left heel, breaking the outer bone of the left foot. Miles also testified that the hold in which he was employed as stevedore was not properly lighted; that this fact contributed to his injury. It also appears from the testimony that the person to whom Miles delivered the barrel which caused the injury, did not properly block the barrel in position which was a part of his duty. It also appears from the testimony that Miles did not complain of the improper lighting to the officer of the ship in charge of the gang of men with whom Miles was working. It further appears from the testimony of the physician who examined and treated the injury to Miles' foot after reaching Seattle, that the injury was not of a serious nature and that the wearing of a shoe would hold the bones in proper position for healing.

During the taking of testimony in the case the claimant Jack Miles died from cerebral

hemorrhage at Tacoma, and letters of administration were taken out to administer his estate by his widow, Helen G. Miles, as shown by the record.”

From these Findings the U. S. Commissioner recommended as his conclusions of law that the claims filed and verified personally by 22 of the claimants be dismissed

“For the reason the testimony as to damages sustained by said Claimants is not convincing and the testimony of the Petitioner shows by a fair preponderance that said Claimants are not entitled to damages in any sum for breach of the implied contract of carriage.” The Commissioner further recommended as his conclusion of law that the claims filed on behalf of 21 of said steerage passengers which were verified by their proctor be dismissed for the reason, 1st, “the amended answer and claims were verified by their proctor without cause being shown for such verification as required by the Admiralty rules of this court”; and 2nd, “for the reasons set forth in paragraph 1 of these conclusions” (Ap. p. 1102).

As to the personal injury claim of Jack Miles, the Commissioner recommended that the same be dismissed. The Commissioner further recommended that each party pay the costs incurred by such party (Ap. p. 1103). This latter conclusion was clearly erroneous, as will be argued in the subsequent portion of this brief.

Thereafter, and on July 20, 1926, the Claimants' objections and exceptions to the Commissioner's Findings of Fact and Conclusions of Law were duly filed and the cause was thereafter submitted to the Hon. Frank S. Dietrich, sitting in the lower court, as a district Judge, upon oral argument and written briefs, and on August 25, 1926, Judge Dietrich's memorandum decision on the merits was filed herein sustaining and affirming the Findings and Conclusions of the said Commissioner.

Judge Dietrich's memorandum decision on the merits follows:

"The issues were referred to a Commissioner, with directions to receive proofs and to report the same with findings of fact and conclusions of law. To findings wholly adverse to their claims, claimants have filed numerous exceptions, requiring an examination of the entire record. Such examination I have made.

A more extreme case of conflicting testimony it would be difficult to imagine. All the witnesses were 'interested.' Claimants first produced nine of their own number who testified that the food and sanitary conditions on the ship were shockingly bad. In defense the petitioner called most, if not all, of the ship's officers, who denied substantially all the specific charges of misconduct and described the food and sanitary conditions as being good. In the guise of rebuttal claimants then produced seven more of their number, whose testimony was along practically the same lines as that of the first nine.

In view of the conditions, it is greatly to be regretted that in taking the testimony care

was not exercised to follow rules which are designed in a measure to counteract the natural tendency of 'interested' testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court undoubtedly these rules would have been enforced, but apparently it was assumed that the Commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight.

The issues are well stated in the Commissioner's report, and no useful purpose would be subserved by an abstract of the voluminous testimony. In resolving the sharp conflict between the two groups of witnesses the Commissioner had the advantage of seeing and hearing the witnesses; and therefore a measure of weight attends his findings.

Of great significance, I think, is the fact that with scarcely an exception, the claimants made no complaint to the ship's officers during the voyage. If, as they now testify, the food was so rotten and so manifestly unfit for human consumption, and if the conduct of the Orientals at the table was so outrageously repulsive, and if the air in the sleeping quarters was so intolerably foul, and the floors in both the sleeping and dining quarters and the toilets were so unspeakably filthy, it is incredible that the passengers would have meekly submitted. There were eighty-eight white passengers in the steerage. Insofar as it appears, forty-six of them never made complaint to the officers during or after the voyage, and of the forty-two who are

here asserting claims, admittedly no one made complaint during the voyage to any one of the general officers in respect to the food or general sanitary conditions, and but few made any complaint whatever even to a subordinate. They were not timid, unsophisticated women and children; apparently they were men of experience, conscious of their rights and of a temper to assert them. I am unable to believe that, if such conditions existed as they describe, they would have gone hungry for days and lived in such filth without vigorous and organized protest. The case they make is thought to be contrary to reason and general experience; and upon the whole I am inclined to concur in the Commissioner's conclusions. Doubtless, there was some gambling in the card games, but here, too, it is thought claimants have greatly exaggerated the effect upon their comfort. The steerage was crowded, but the rules were relaxed, and without serious interference steerage passengers were permitted to frequent and occupy other parts of the vessel ordinarily reserved for passengers of other classes."

With reference to the claim of Jack Miles for personal injury and the claim of Helen G. Miles as administratrix of the estate of Jack Miles, deceased, Judge Dietrich finds:

"The evidence upon this claim is extremely meager, and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was, it was the negligence of a fellow servant, for which, under the established rule in this Circuit, recovery cannot be had." (Ap. p. 1114.)

On September 22nd, 1926, final decree was entered in accordance with the memorandum decision

of Judge Dietrich dismissing the claims without cost. On December 21st, 1926, notice of appeal was filed and the cause is now before this court upon the typewritten Apostles on appeal.

All of the testimony on behalf of the claimants and all the testimony on behalf of the Petitioner was taken before the Hon. A. C. Bowman, United States Commissioner. Under the well settled rule applicable in admiralty, the findings of the Commissioner from conflicting evidence upon questions of fact, will not be disturbed by this court unless clearly against the weight of evidence. If such findings are supported by competent evidence, they will not be disturbed on appeal.

Luckenbach S. S. Co. vs. Campbell, 8 Fed. (2nd) 223.

Cary-Davis Tug & Barge Co. vs. United States, 8 Fed. (2nd) 324.

And where such findings of fact have been reviewed by the District Court and affirmed in all respects, this court will not disturb the same except for very apparent and manifest error.

“The question is one of fact depending very largely upon the credit to be given to the various witnesses seen and heard by the Commissioner. Under these circumstances not only is there very reasonable presumption in favor of the Commissioner’s finding and the decree of the District Court based upon such finding, but this Court would not be justified in setting aside or modifying the decree unless there clearly appears to have been error or mistake in the

finding of the Commissioner or the conclusion drawn therefrom.”

United S. S. Co. vs. Haskins, (C. C. A. 9th Circuit) 181 Fed. 962 at page 964.

ARGUMENT.

For the purpose of clarity and argument, we will in this brief designate the Appellee in this court as Petitioner and the Appellants in this court as Claimants.

This being a proceeding for limitation of liability, the cause is initiated by the filing of the Petition setting forth the facts showing the Petitioner's right, first, to a total exemption from all liability, and second, in the event the exemption is denied, then the Petitioner's right to limitation of its liability. Two distinct issues are thus presented.

The S. S. "Hewitt," 284 Fed. 911.

The Claimants may either admit the Petitioner's right to limitation, contest Petitioner's right to total exemption, or Claimants may contest both issues. The basis of the Claimants' right to enter a contest upon either issue of exemption or limitation is predicated upon a claim filed in the limitation proceeding. Claims filed in limitation proceedings are in the nature of original libels and must set forth the

facts upon which the Claimants' cause of action against the Petitioner is predicated, with the same degree of distinctness and clearness that is required of an original libel in admiralty.

In Re Davidson S. S. Co., 133 Fed. 411;

The Pere Marquette, 203 Fed. 127.

The burden of proving the allegations of the claims is always upon the Claimants to the same extent that the burden of proving the allegations of an original libel in admiralty is upon the libellants,

"The John H. Starin," 191 Fed. 800;

The "Titanic," 225 Fed. 747;

The 84-H, 296 Fed. 427.

While the burden establishing Petitioner's right to limitation of liability is always upon the Petitioner, this issue was not contested in the lower court, and in any event, it appearing that the total amount of claims filed with the Commissioner were less than the appraised value of the said vessel and her pending freight, the issue of limitation of liability becomes immaterial.

The Santa Clara, 174 Fed. 913.

In the lower court the Claimants moved for a dismissal of the limitation proceedings upon the ground that the total amount of claims filed were less than the appraised value of the said vessel and her pending freight at the termination of the voyage. The lower court denied this motion.

“The motion must be denied. From the statements in the several claims filed, it is clear that the conditions that obtained in the steerage was common, and if these claimants are entitled to recovery, other passengers may have equal right and the Court cannot say that if forty-three claimants are entitled to \$45,000.00 exclusive of costs, the remaining One hundred and forty-five claimants would not be entitled to more than the difference between \$45,000.00 and \$79,821.60, the value of the ship and her pending freight. * * * The order of this Court fixing or limiting the time within which claims may be filed is not a bar to the prosecution of an action within the period limited by statute if this proceeding should be dismissed. Hence, there is a probability of claims in excess of the value of the vessel and pending freight and the right of limitation is not defeated by the fact that the claims upon which suit has been commenced do not amount to the admitted value of the ship where there is a probability that there may be other claims. *The Defender*, 201 Fed. 189.” (Ap. p. 55.)

The right of a petitioner to maintain limitation of liability proceedings is to be determined from the probable or possible amount of claims *at the time the proceeding is initiated*. If it appears clearly *from the petition* that the total of all possible claims cannot equal the appraised value, then limitation proceedings clearly would not lie (*Shipowners' & Merchants' T. Co.*, 218 Fed. 161), but if at the time the petition is filed there is a possibility that the total of all claims may exceed the value of said vessel and her pending freight, then the proceedings will lie and the fact that the total amount of claims

subsequently filed do not equal the appraised value of the vessel and her pending freight would not oust the court of jurisdiction.

The George W. Fields, 237 Fed. 403;

The Defender, 201 Fed. 189;

Benedict on Admiralty, (5th Ed.) Sec. 495.

In this case, it is clear, as stated by Judge Netterer, that the total amount of possible claims would far exceed the appraised value of the vessel and her pending freight provided the claims actually asserted at the time the petition was filed were valid. At said time forty-three claims had been asserted claiming damages in the sum of \$45,000.00. There were one hundred and forty-five additional steerage passengers, similarly situated to those filing claims and on the basis of the claims filed, these additional passengers would be entitled to \$145,000.00, or a total of all possible claims of \$190,000.00, being far in excess of the appraised value of said vessel and her pending freight. In answer to this contention, Claimants assert that there was limitation in the steerage passenger tickets limiting their time for filing claims to a period of ten days from the date of the vessel's arrival at destination, which limitation the Claimants assert was reasonable and valid. There are two obvious answers to this contention.

First: It appears from the Claimants' own brief that of the one hundred and ninety steerage passengers, one hundred and two were Orientals, and that no steerage ticket was issued to these Orientals,

so they of course were not subject to this limitation of time within which to file claim.

Second: The validity of the ten day limitation for filing claims is dependent on whether or not the same is under all the circumstances reasonable. In other words, the limitation contained in the passenger tickets is a matter of defense to be asserted by the carrier. It is not a matter of absolute defense, but is one depending upon all the facts and circumstances of the voyage and would have to be litigated in the proceedings.

Third: The lower court in a prior case involving the identical ten day limitation contained in passenger tickets *on this same vessel* on this identical voyage held the same to be unreasonable and void.

Blackwell vs. Alaska S. S. Co., 1 Fed. (2nd)
33A.

The claimants further contend that the total amount of claims filed being less than the appraised value of the vessel and her pending freight, that the Petitioner is not entitled to contest the issue of exemption, but on the contrary the Claimants are entitled, without further proof, to a decree for the full amount of damages claimed. The absurdity of this contention is apparent on the face of it.

In the first place, it presupposes that upon filing a petition of limitation, there is an absolute admission of liability concerning which limitation is sought, or stated in another way, that a Petitioner,

in seeking the benefit of the limitation of liability statutes, is deprived of any right to contest either its liability or the amount of the claim. Under the American law it is established that a shipowner seeking the benefit of the limitation of liability statutes may either admit liability and waive the right of exemption and seek merely the limitation of such liability, or he may deny any liability, claiming a total exemption therefrom and in the alternative, seek a limitation of liability, in the event his claim for exemption is denied.

Benedict on Admiralty (5th Ed.), Sec. 485.

In this case the Petitioner expressly denied all liability and prayed for a total exemption therefrom and in the alternative, asked for a limitation of liability in the event his claim for exemption should be denied.

The fact that the total claims filed were less than the appraised value of the vessel and her pending freight has no bearing upon this issue.

Claimants' further contention that the mere filing of a verified claim is sufficient to establish the same without further legal proof is clearly unfounded. The burden of proof as to liability of the Petitioner and the amount of damages sustained by the Claimants is always upon the Claimants.

"The John H. Starin," 191 Fed. 800.

Rule 85 in Admiralty of the lower court pro-

vides that proof of claim shall, in the first instance, be by affidavit specifying the grounds and the amount, etc., and that such proof shall be deemed sufficient, unless the claim be objected to by the Petitioner or some other Claimants, in which event "any claims so objected to must be established by a further legal *prima facie* proof or notice to the objecting party as in ordinary cases."

Petitioner herein having filed due and timely objections to each of the claims, the burden of establishing liability and the amount of damages sustained by each Claimant was clearly upon the Claimants.

In the case at bar, out of forty-three claims filed, only nine claimants appeared and testified in support of such claims and as found by the Commissioner and affirmed by Judge Dietrich, such proof neither established liability of Petitioner or any basis of damages.

We will now discuss the question raised by this appeal as to the merits of the claims herein filed. There are two classes of claims to be considered.

First: Claims for breach of contract of carriage and Second, claims for personal injury and death of Jack Miles.

We will discuss these in order.

CLAIMS FOR BREACH OF CONTRACT OF CARRIAGE.

In view of the adverse findings of both the Commissioner, before whom all the testimony was taken, and his Honor Judge Dietrich, who made a full review of the record upon the exceptions of the Commissioner's findings and conclusions, we need only consider the question as to whether or not such findings and conclusions of the two lower tribunals are supported by any competent evidence. In considering this question, we will make no attempt to follow the Claimants' brief herein, for the simple reason that said brief is written very largely entirely apart from the record. As the burden was upon the Claimants to establish by a preponderance of evidence, a breach of contract and the damages accruing therefrom, to each of the Claimants, the discussion should be limited strictly to the facts disclosed by the record in this case. Proctor for Claimants has made no attempt to so limit his argument. As stated by Judge Dietrich, there was a sharp conflict between the evidence given by the nine witnesses testifying in chief for the Claimants and the nineteen witnesses who testified on behalf of the Petitioner upon the issues of fact involved in this case. The Claimants' witnesses testified to conditions in the sleeping quarters, eating quarters and to unsanitary conditions aboard this vessel which were unbelievable. The testimony of these witnesses was contradictory in many respects and was grossly exag-

gerated upon all the essential issues in this case. The uniformity of the testimony is easily explained in the manner in which the same was introduced. In view of the fact that all of the witnesses were interested, that is, were asserting claims in this proceeding, Petitioner demanded that prospective witnesses be excluded. This demand was refused by proctor for Claimants and was not enforced by the Commissioner. Testimony was brought out very largely by leading questions propounded by proctor for Claimants, over the objection of the Petitioner. Judge Dietrich's criticism of the proceedings before the commissioner was well warranted.

“It is greatly to be regretted that in taking the testimony, care was not exercised to follow rules which are designed, in a measure, to counteract the natural tendency of interested testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court, undoubtedly these rules would have been enforced, but apparently it was assumed that the commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated, they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight.”
(Ap. p. 1111.)

The undisputed testimony in this case shows that the S. S. “Victoria” had been operating as a

freight and passenger vessel since the year 1903, between Nome, Alaska, and Seattle. During this entire time, the steerage sleeping quarters had been located on the deck below the tween decks and the steerage dining room and toilets located on the tween deck. The "Victoria" was one of thirteen combination freight and passenger vessels operated by the Alaska Steamship Co. between Seattle and Alaskan ports. Her steerage compartment had been inspected by the local United States inspectors and a certificate (Petitioner's Exhibit 5) issued by said inspectors permitting her to carry 204 steerage passengers. This last certificate was dated May 2nd, 1924. She was subsequently inspected on May 31st, 1924, and an additional certificate issued for the carriage of eighty additional passengers, or a total of two hundred and eighty-four steerage passengers (Ap. p. 794). Before these certificates were issued the United States customs officials had inspected the quarters and certified the cubic space of the same to the United States inspectors (Ap. p. 795, p. 798). The travel between Seattle and Nome is extremely heavy on the first trip in the spring northbound and the travel between Nome and Seattle southbound is extremely heavy on the last trip in the fall. These steerage passengers (Claimants herein) were largely prospectors, mine operators and laborers whose operations were limited to the open summer season, the balance of the year the port of Nome being ice-bound. In the spring of 1924 the S. S. "Victoria" carried northbound on the trip, leaving Seattle in

June, a total of 257 steerage passengers; with one or two exceptions only, all of the Claimants in this proceeding were passengers on this northbound trip of the "Victoria" in the spring of 1924. Without any exception every one of the Claimants had travelled previously in the steerage of the "Victoria" between Nome and Seattle, some of them as often as twice a year during the last twenty years (Ap. p. 506, p. 1052). It is admitted that the sleeping quarters, the dining quarters, the toilets and all other conditions complained of by the claimants herein were in the same location and in the same conditions as existed on all previous voyages made by said claimants on said vessel.

Despite this admitted fact, an examination of the claims herein show that the Claimants and each of them are asserting a special contract of carriage based upon express representations alleged to have been made to each of said claimants by the agent of the Petitioner at Nome, Alaska, at the time the steerage passenger tickets were purchased from said agent. The agent denied making any express representations as to the food, quarters, etc., as an inducement for the sale of these steerage passenger tickets (Ap. p. 672) and not a single claimant testified to any such express representation or agreement. The claimants and each of them admitted full knowledge as to the steerage quarters aboard this vessel and their right of recovery, if any, must be based upon a breach of the Petitioner's implied contract as a carrier to furnish adequate accommo-

dations such as are customarily furnished to steerage passengers in said trade and to keep the same reasonably clean and sanitary during the course of the voyage and to furnish proper and sanitary food. This, of course, does not mean that the Petitioner was to furnish quarters equal to those furnished first class passengers, nor to furnish food of the same quality and variety.

“It is obvious, that to a certain extent, some of the discomforts complained of were incidental to a voyage of this description by passengers who had only the right to a second cabin passage. * * * That those who occupied the second cabin should suffer some discomfort from foul air, etc., was unavoidable, for a considerable number of the passengers could not be placed in a single cabin tween decks without being far less agreeably situated than if they had occupied state rooms on the deck above.”

The Sonora, Fed. Case No. 746.

At the time of leaving Nome, Alaska, on August 22nd, there were fifty-six white passengers in the steerage of this vessel. These passengers consisted very largely of employees of the Hammond Mining Co. at Nome, Alaska, who had gone out on strike at said mine, resulting in the closing of the same before the end of the season. These passengers were all placed in the forward steerage compartment, having a capacity of seventy-two passengers. This compartment was adequately ventilated by two cowl ventilators which went through to the main deck of the steamer and by No. 1 hatch, which was kept open at

all times during the voyage, with the exception of one night when it rained (Ap. pp. 703 to 706. Pet. Ex. 2). At the time of leaving Nome, the vessel had sixty-seven first class passengers. She called at Unalaska, took on board seventeen additional first class passengers, and on August 25th called at Akutan, where she took on cargo, one steerage and one first class passenger, and on August 26th, called at False Pass, where she took on cargo, eighteen first class and sixty-four steerage passengers. She next called at Seward, Alaska, where she took on thirty first class passengers, including Governor Sulzer of the Territory of Alaska and two steerage passengers. She next called at Latouche on August 30th, taking on eight first class and thirty-two steerage passengers. She next called at Drier Bay, taking on eleven first class and thirty-five steerage passengers. At the time of sailing from Drier Bay for Seattle, she had on board one hundred and fifty-two first class and one hundred and ninety steerage passengers. Of the steerage passengers, one hundred and two were Orientals and eighty-eight white passengers. After leaving Nome, standee berths were placed in No. 2 steerage for the accommodation of the additional steerage passengers. This compartment is ventilated by four large ventilators, two forward and two aft, and by No. 2 hatch, which was kept open, excepting when the condition of the weather prevented (Ap. pp. 703-706. Pet. Ex. 2). Shortly after leaving Drier Bay, a paper or agreement of some kind was circulated among the steerage passengers and was signed

by forty-two or forty-three such passengers, *all of whom had taken passage at Nome, Alaska*. The other forty-five or forty-six white passengers refused to sign the paper and none of the one hundred and two Orientals signed the same. This paper contained some form of agreement or representation which was torn off before the same was offered in evidence in this case (see Cl. Ex. C). Demand was made for that portion of the petition which had been torn off, which demand was refused by the Claimants (Ap. p. 754).

Claimants Berglof and Littrel drew up this paper and circulated it among the passengers (Ap. p. 576). Their signatures appeared first on the paper. Claimants' Exhibit C shows the signature of Berglof and Littrel near the bottom of the page. It further shows that whatever was written at the top of the page, above the signatures of these two Claimants, has been cut off and what little remains of the original sheet, with the agreement eliminated, has been pasted on to the bottom of what was originally the *second* page of signatures. That the paper originally contained a form of agreement is admitted by Claimants' witnesses (Ap. p. 622).

It appears from the evidence, however, quite clearly that this paper was circulated upon the representation that the steerage passengers signing the same would get a refund of their passage money (Ap. pp. 965-966, p. 754). The signers of this paper now appear as Claimants in this proceeding, although

only nine of said signers testified in chief as witnesses for the Claimants. Of the signers to this paper, five were seamen formerly employed by the petitioner who had deserted one of their vessels at Nome, Alaska, for the purpose of obtaining higher wages in the mines (Ap. pp. 771 to 777). One at least was an employee in the steerage department whose sole duty was to keep the steerage sleeping quarters properly swept up and cleaned. One complaint made by the Claimants is that this man, also a Claimant, did not perform his duty. At least two of the Claimants were former employees in the steerage department of this vessel—one of whom had worked several seasons (Ap. p. 537), and the other had worked on the northbound voyage in June of the same year (Ap. p. 930).

The various allegations of the claims herein are concisely stated by the United States Commissioner as follows:

First, that the food was not fit for human consumption and that they were unable to eat it and were forced to go hungry or purchase food from under stewards or waiters.

Second, that the steerage was not properly ventilated, causing headache and other disagreeable reactions.

Third, that the steerage was not kept clean, vomit from seasick passengers not being properly removed, causing offensive odors to permeate the steerage.

Fourth: That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health.

Fifth: That gambling was allowed to be carried on in the dining room (on the deck above the steerage) during the daytime and the night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night (Ap. p. 1099).

We will consider their contentions briefly in the order designated by the Commission.

1. THAT THE FOOD WAS NOT FIT FOR HUMAN CONSUMPTION AND THAT CLAIMANTS WERE UNABLE TO EAT IT.

Testimony shows without contradiction that the S. S. "Victoria" was equipped with three modern cold storage compartments and one cooler. The uncontradicted evidence of Mr. Nelson, the port steward of the Petitioner, is that all supplies for this and other vessels of the Petitioner's fleet were purchased through his office upon requisition of the chief stewards of the various vessels. That his Company purchased one quality only of provisions for these vessels, with one exception; that all of the fresh meats, vegetables, eggs, bacon and staple supplies are of the very best quality for use by the first class, steerage and crew (Ap. p. 813); that a slightly cheaper

grade of coffee is purchased for the crew and steerage than that purchased for the first class passengers (Ap. p. 813). That all other provisions are of the same quality. A complete list of the provisions supplied by the S. S. "Victoria" at the time she left Seattle for Nome was introduced in evidence as Petitioner's exhibit A-20 and there is no segregation whatever as between first class, steerage and crew provisions.

On the southbound voyage, the chief steward bought additional fresh meats at Seward and Latouche, to be on the safe side (Ap. p. 680). On this round trip voyage the "Victoria" was supplied for 25,000 meals and there were actually served 22,000, leaving a surplus of 3,000 meals upon her arrival at Seattle (Ap. p. 821). As to the quantities supplied at each meal, or rather per day per passenger, it appears that during the late war, the United States Food Administrator obtained accurate data from numerous steamship lines upon which it issued instructions to operators of U. S. Shipping Board vessels (which operators included the Petitioner during the said war) providing for 105.54 ounces of food per day per passenger. On this particular trip of the "Victoria" her records show that she supplied 111.27 ounces per day per passenger (see Pet. Ex. 8, Ap. p. 819).

The testimony of A. Brown, chief cook, shows that on this vessel all of the food supplies were kept in the same compartment, all of the meats and vege-

tables being kept in the same cold storage compartments, where it was impossible for them to become tainted; that all of the food was cooked in the same kitchen on the same range in the same utensils, and there was no segregation or difference between the food supplied the first class passengers, the steerage passengers and the crew (Ap. p. 695). The only difference was in variety, and not in quality or quantity. This testimony is corroborated by the chief steward as to the adequacy of the supply of the food (Ap. p. 679), as to the quality of the food furnished the first class and steerage (Ap. pp. 678-9), and by the steerage steward (Ap. p. 742); by the chief baker (Ap. p. 836); by the storekeeper (Ap. p. 840); by the second steward (Ap. p. 856), and by the chief butcher (Ap. p. 866). It is true that in the steerage compartment the meals are served "family style," there being no seat checks, but this is customary in all steerages (Ap. p. 682). It is contended by Claimants that from time to time they purchased food from some members of the steerage steward's department or from the cooks. This is denied by the steerage employees and the cooks, and an examination of the Claimants' testimony in this respect shows that most of the food claimed to have been purchased consisted of sandwiches and coffee purchased in the evening after the meals were over (Ap. p. 640, p. 666, p. 934), or for delicacies, such as chickens and fresh fruit, which are not ordinarily served in the steerage (Ap. pp. 899-900), in consideration of which the passengers gave the em-

ployees a tip ranging from 25 cents to \$1.00 (Ap. p. 900). Each and every one of the officers of this ship testified that they were in the steerage many times during the day, all of them having their uniforms on, the cap showing their official position, and that no complaint was ever made by any of the steerage passengers as to the quantity or quality of food served in the steerage, or as to any other condition alleged to have existed on board of said vessel.

2. CLAIM THAT THE STEERAGE WAS NOT PROPERLY VENTILATED.

The ship's plans (Pet. Ex. 2) shows that the steerage quarters were amply ventilated by four cowl ventilators from the outside deck, two ventilators to the tween decks and by No. 1 and 2 hatches, which were at all times kept open, weather permitting.

The chief officer testified in detail as to the ventilation and the adequacy of the same (Ap. pp. 703 to 707), and that no complaint was ever made as to the lack of ventilation; with the exception of one occasion, when a steerage passenger complained that other steerage passengers had stopped up one of the ventilators on the ground that the steerage was too cold (Ap. p. 710). This testimony is not disputed with the exception of the unlicensed testimony of certain Claimants that there was absolutely no ventilation whatever in the steerage.

It is undoubtedly true that in the space occupied by one hundred and ninety passengers there was, to a certain extent, some discomfort from close air, but this condition as stated in the "*Sonora*" case, *supra*, was incidental to passengers travelling in the steerage compartment.

3. CONTENTION THAT THE STEERAGE WAS NOT KEPT CLEAN.

It appears without contradiction that George Condell, one of the Claimants herein, was employed for the sole purpose of keeping the steerage properly swept up and cleaned. The Captain testified that he went through the steerage quarters from two to three times a day and so far as he could see, the ventilation was good and the floors and quarters were kept clean and sanitary (Ap. p. 727). During these inspections in passing through the steerage quarters, there was every opportunity for the steerage passengers to complain as to the conditions in said quarters, but no complaint was ever made (Ap. p. 730). It was his testimony that if complaints had been made or he had ascertained from his inspection, the quarters were not being kept clean and sanitary, he would have ordered the chief steward to place additional men in the steerage for that purpose (Ap. pp. 729-730). The chief steward testified that every morning during the entire voyage and as part of his regular duties, he made an official inspection of the steerage quarters for the express purpose of seeing

whether they were kept clean and in a sanitary condition (Ap. p. 684); that there were eight employees in the steerage department, to one of whom was allotted the duty of keeping the sleeping quarters clean. He had no other duties aboard this ship. If the quarters had not been kept clean, there were ample men on board in the steerage department and he would have ordered additional men into the steerage quarters for this purpose (Ap. pp. 685-686). He testified that in addition to his official inspection, he went through the steerage quarters several other times during the day.

“Q. When you were down inspecting the sleeping quarters, did any of these steerage passengers make any complaint to you?”

“A. No.”. (Ap. p. 686.)

The steerage steward testified that he went through the steerage sleeping quarters three or four times a day; that the quarters were kept clean and in a sanitary condition and that no complaint was ever made to him by steerage passengers (Ap. pp. 748-749, p. 752).

The third officer testified that he spent considerable time in the steerage quarters while off duty, as he was acquainted with a number of the steerage passengers, but no complaint was ever made to him with reference to any conditions in the steerage sleeping quarters, dining room or toilets (Ap. p. 761).

The chief pantryman testified that he visited the steerage sleeping quarters several times a day and that the same were kept clean and sanitary (Ap. pp. 781-782).

The second steward likewise testified that he made an official inspection of the steerage quarters, both eating and sleeping, every day and that the same were kept in a clean and sanitary condition and that no complaint was ever made to him by any steerage passenger (Ap. p. 853, p. 858).

4. COMPLAINT THAT EMPLOYEES SCATTERED CHLORIDE OF LIME ON THE DECK OF THE STEERAGE.

The testimony shows that chloride of lime, which is a well-known disinfectant, was placed in one place in the steerage where a passenger had been sea-sick, only on *one occasion*. Testimony by Mr. Howard, an expert chemist, was to the effect that chloride of lime in such quantity as was placed on the floor of the steerage could not have any injurious effect (Ap. p. 1085). This complaint is not seriously urged excepting with reference to the claim of Jack Miles, deceased, and we will consider the same more fully in discussing said claim.

5. THAT GAMBLING WAS CARRIED ON IN THE DINING ROOM, DEPRIVING THE STEERAGE PASSENGERS OF A PLACE TO LOUNGE DURING THE DAY AND EVENING IN THIS STEERAGE.

There were one hundred and ninety passengers in this steerage. The testimony of Claimants' own witnesses is to the effect that the Orientals kept very much to themselves. The capacity of the four tables in the dining room was forty-eight passengers. It is undoubtedly true that during the day and a portion of the nights there was cardplaying and possibly a certain amount of gambling carried on in the steerage dining room. This, however, was carried on almost entirely by the steerage passengers themselves. As stated by Judge Dietrich, Claimants' evidence as to the extent of gambling was undoubtedly exaggerated. There were signs in the steerage prohibiting gambling and the master repeatedly warned the steerage passengers to refrain from gambling (Ap. p. 735). On a long ocean voyage, it is impossible to prevent cardplaying and incidentally a certain amount of gambling. This, however, would not constitute a breach of contract of carriage, unless the steerage passengers were deprived of some rights thereby. The claim that the passengers were deprived of the use of these quarters for lounging is certainly not well taken, as the men engaged in cardplaying and gambling were all members of the steerage and entitled as such to the use of these quarters. There was some suggestion in the evidence that one member of the steerage crew was engaged in the gambling, but he was not identified and all of the members of the crew who were called denied that they took any part, either in the card playing or the gambling.

It appears without contradiction that on this particular trip the Captain had relaxed the rule universally applied on passenger vessels with reference to restricting the steerage passengers to their own quarters and the main deck forward. On this particular voyage the passengers were allowed the free run of the ship, including the first class deck space, smoking room and social hall. The testimony in this respect is uncontradicted, Captain Davis (Ap. p. 733), Chief Steward (Ap. p. 689), Purser Parker (Ap. pp. 800-801), First Officer Baker (Ap. p. 714), Third Officer Aylward (Ap. p. 762), W. W. Mason, chief baker (Ap. p. 837), S. R. Davis, storekeeper (Ap. p. 843, p. 850), E. Lowery, second steward (Ap. p. 858), Freight Clerk Lawson (Ap. pp. 872-73), and in fact is admitted by claimants' own witnesses (Ap. p. 891).

A few of the claimants make a further complaint that a large quantity of salmon was loaded in the after part of No. 2 steerage, as a result of which, said quarters were unduly crowded. Like the other complaints urged in this case, this particular one was grossly exaggerated. The fact is that 1200 cases of canned salmon was stowed against the after bulkhead to give the ship a proper trim (Ap. p. 1026). The salmon only covered half the space between the bulkhead and the after end of No. 2 hatch (Ap. p. 1023). There were 210 standee bunks in place or 20 more than the total number of steerage passengers (Ap. p. 1023), and there was

ample space for additional bunks, which were not required (Ap. p. 1024).

Testimony of these witnesses introduced by the petitioner sustains the findings of the Commissioner and the decision of his honor, Judge Dietrich. It is very apparent from a reading of the record in this case that these claims were asserted against the petitioner in accordance with the plan which was conceived on board the S. S. "Victoria" during her southbound voyage by a group of disgruntled miners from the Hammond Mine, Nome, Alaska, who were forced out of employment and their season's wages seriously curtailed by a strike, in which they participated, and probably precipitated. These men were fully aware of the accommodations afforded in the steerage quarters of the S. S. "Victoria" at the time they purchased their tickets and it was upon the representation that they could recoup their losses, at least to the extent of recovering back their passage money, that the ringleaders in this scheme induced a substantial number of their fellow miners and strikers to sign the agreement which subsequently resulted in this proceeding.

As well stated by Judge Dietrich, these passengers were not women and children, or inexperienced men. They were all experienced men and of a character and temper to vigorously assert their rights. As previously stated, five of the claimants were deserters from the petitioner's steamer "Oduna" at Nome; several were previous employees

in the steerage department of this vessel and one at least an employee on this particular voyage and one of them an admitted active participant in the gambling alleged to have been carried on on this voyage, and practically all of them strikers from the Hammond mine. They had traveled on this vessel repeatedly on previous voyages and knew what steerage accommodations and steerage food should be furnished them. As admitted by one of the claimants, their real complaint was that Orientals were placed in the steerage on the southbound voyage, but surely this does not constitute a breach of contract. They well knew that Orientals customarily traveled in the steerage and so far as the record shows, these Orientals disported themselves in a more orderly and cleanly manner than the claimants in this case. If these men had had any such grievance as some of them have testified to in this case, they would have vigorously asserted the same. The fact that during the entire voyage not a single complaint was made to an officer of this vessel is in itself very persuasive that the present claims are unfounded.

The carrier's duty to its passengers is well stated by his honor, Judge Hunt, in the "*Santa Clara*" case, 174 Fed. 913:

"When the appellees bought their tickets and boarded the ship, they had a right to reasonably clean and comfortable quarters and they had a right to expect that the ship's officers and employees would do all in their power to so furnish them."

The extent of the carrier's obligation in this respect is dependent upon the class of accommodations contracted for by the passengers. It was not to be expected that the accommodations in the steerage compartment should be of the same character, either as to ventilation or cleanliness, as accommodations in the first class.

As stated in the "*Sonora*" *supra*, certain discomforts are incident to an ocean voyage in second class or steerage quarters. With one hundred and ninety passengers occupying open space in close proximity to each other, it was unavoidable that there should be some discomfort from close air, etc. What would satisfy one passenger would not satisfy other passengers in the same quarters. These conditions are unavoidable.

It is very significant that not one single steerage passenger, either white or Oriental, signed this agreement aboard the "Victoria" or filed a claim against the Petitioner or joined in this proceeding, as a claimant, excepting this group of disgruntled miners who took passage at Nome.

Not a single first-class passenger joined in this proceeding or testified on behalf of Claimants, although the evidence stands uncontradicted that the same food (differing only in variety) was served to the first-class passengers as was served to the steerage passengers.

We respectfully submit that the decree of the

lower court dismissing the claims for breach of contract of carriage should be affirmed, and that the decree disallowing costs to the petitioner should be reversed.

CLAIM FOR PERSONAL INJURY AND DEATH OF JACK MILES.

Jack Miles was a steerage passenger on this voyage of the steamer "Victoria." He had been working as a carpenter for a mining company at Nome during the summer season, at wages of \$8.00 per day and board. The "Victoria" left Nome on August 22nd, and arrived at Akutan on August 24th, at which port she loaded 800 drums of whale oil, weighing approximately 1200 pounds per drum. In addition to the ship's crew a number of the steerage passengers were employed to assist in loading this whale oil, Claimant, Jack Miles, being one of the men so employed. These drums of whale oil were loaded in various parts of the ship, and while loading the same in No. 4 hold, Jack Miles claims to have been injured.

He testifies that these drums were lowered into the hold by the ship's winches, that five men besides himself were working in the hold and that it was their duty to roll these drums into the after part of the hold where they were supposed to be blocked up

and stowed by some member of the ship's crew. It was his claim that there was insufficient light in the after part of No. 4 hold; that he rolled one of the drums into the after part of said hold where it was dark, that he could not see the man who was supposed to block up the drum and without waiting to see whether the same was blocked up, or even that the said man was present in his position to take care of the drum, that he, Miles, turned around to walk back to the square of the hatch, and had taken only a few steps when the drum rolled back and crushed his heel.

“Q. How far back did you roll them from the place where they came down?”

“A. Well, I should judge it was over fifty feet, I don't know how much further it seemed like it was quite a ways back there. It was in the dark there. I could not see the place with the light they had and I do not know what it looks like back in there and there were three of us would roll it back and then go back to get another one. While I was trying to get away from there, I was walking away from there and one of the barrels rolled back and caught my foot.”

(Ap. p. 439).

“Q. After you got them aft how would you block them up?”

“A. They were not blocked up, they were rolled up there. I saw one blocked when it started to roll a little bit.”

“Q. Were you working blocking them up?”

“A. I was not supposed to pay any at-

tention to that part of it. I was supposed to go back and start another barrel on its way.”

“Q. All you were doing was rolling barrels back, and another man also was blocking them up?”

“A. Two of them went back and started to get them away from the hatch. Then that man would look after them back there and then he would come and help us roll it back.”

“Q. What did you put under them after you got them back there?”

“A. The deck was all we had to put under them.”

“Q. You had to set them on their end?”

“A. That is what they were supposed to do, but I didn't. After I got hurt, I didn't do much then.”

“Q. Before you got hurt were you helping roll them back and then upend them?”

“A. We upended three or four at first and then we rolled them over to the side of the ship because they would not stay up on end. There was not room enough to set them up on end.”

“Q. Were you just rolling them there and leaving them there on the sides?”

“A. Left them there for this fellow to look after them” (Ap. pp. 452-453).

“Q. * * * After you had rolled this barrel back to him, do I understand you turned around and then the barrel rolled and hit you?”

“A. I started to walk back toward the hatch and the barrel we had just previously rolled there from the hatch rolled back and hit me.”
Upon this evidence Judge Dietrich held:

“The evidence upon this claim is extremely meagre and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was it was the negligence of a fellow servant.”

We submit that upon the merits of the claim there was no evidence to establish negligence on the part of the Petitioner. According to the Claimant's testimony, he rolled this heavy drum back into the after part of the ship where it was so dark that he could not see, and without upending the drum or blocking it off to keep it from rolling, or without waiting to deliver the drum to the man whose duty it was to stow the same, he turned around and had taken a few steps when the drum rolled back and struck his heel. There were six men engaged in this work, three in each gang. The member of the crew in the after part of the ship in charge of the stowage was supposed to block off the drums to keep them from rolling. Whether he was engaged in blocking off a drum which had been rolled back by the other gang or was even present in the after part of the ship at the time the Claimant, Miles, rolled this particular drum into the after part of the ship does not appear from the evidence. Certainly it was Miles' duty to retain possession of the drum until he had safely delivered the same to the man whose duty it was to stow said drum. Miles does not claim that he performed this duty or that he took any precaution whatsoever to see that this heavy drum was safe before he released it. On the

contrary his testimony is that he rolled it into the after part of the ship where it was dark, immediately turned around and had only taken a few steps when the drum rolled back and struck him. Certainly there is no evidence of Petitioner's negligence.

On the question of light, the First Officer testified that there were ample lights in use, that no complaint was made to him as to the necessity for additional lights, that there was an extra supply of lights aboard and that additional lights could have been furnished if required (Ap. p. 717). Claimant Miles makes no contention that any promise was made to furnish additional lights. He had been engaged in this work for seven hours and if in fact it was true that the insufficiency of light was the cause of the accident that condition was known to the Claimant and the risk incident thereto was assumed by him.

After completion of this work at Akutan, Miles was paid off and signed the Longshoremen's payroll which contained the following release:

"In consideration of receiving the amount stated below from the Alaska Steamship Co. I hereby release and discharge the Alaska Steamship Co. from all claims, demands and causes of action whatsoever from the beginning of the world to this date." (Petitioner's Exhibit 3, being copy of original payroll.)

This accident having occurred on August 25th, no complaint was made by the Claimant until the

following morning, when he went to the Stewardess, who bathed his foot in a solution of salts. No further treatment was requested or given. On August 26th the vessel arrived at False Pass and loaded some 29,000 cases of canned salmon. Claimant, Miles, not only did not make any complaint to any of the ship's officers as to his alleged injury but on the contrary he solicited the First Officer for employment at False Pass, and together with other steerage passengers was employed to assist in loading this canned salmon. He worked for eighteen and one-half hours at False Pass, receiving \$18.50.

“Q. What character of work was he doing?”

“A. Loading salmon.”

“Q. What particular work was he doing in connection with loading salmon?”

“A. Piling and carrying when I saw him.”

“Q. Carrying cases and piling them.”

“A. Yes sir.”

“Q. Had he made any complaint to you prior to performing this work at False Pass with reference to being injured?”

“A. No sir.”

(Testimony, First Officer, Ap. p. 716.)

Miles made no complaint to the ship's officers with reference to his alleged injury until two days after the vessel had left False Pass (Ap. p. 718). The vessel arrived at Seward on August 28th and

remained there for 24 hours. Claimant did not go to a doctor at this port and on August 30th the vessel called at Latouche and remained there for 12 hours, but the Claimant did not consult a doctor at this port. After arriving at Seattle on September 4th the Claimant, Miles, joined with other steerage passengers in making demand for \$250.00 damages for breach of contract of carriage, but did not at said time make any demand for his alleged personal injury. On September 25th, three weeks after the vessel arrived in Seattle, Claimant, Miles, called upon the Superintendent of the Petitioner and was given an order for medical treatment at the Virginia Mason Hospital. He testified that he was given treatment first by Dr. Dowling and afterward by Dr. Lyle of said hospital. Dr. Dowling was produced as a witness on behalf of the Claimant and testified:

“Q. Will you tell the Court the nature of the injury you found?”

“A. It was a fracture of the fifth left metatarsal bone.”

“Q. Was there any straining or tearing of the ligaments of the ankle on the left foot?”

“A. There was nothing apparent.”

* * * * *

“Q. Had the bone ever been set before he came to you, as you recollect?”

“A. It was not out of place when I examined it.”

“Q. What did you do?”

“A. I dressed it for him.”

“Q. And have you ever examined him since that time?”

“A. Not that I remember” (Ap. p. 592).

“Q. And the use of the foot with that bone rubbing against the side of the shoe would naturally cause pain and prevent any form of healing until it was set in the proper way and at the proper time, would it not?”

“A. We usually consider that the wearing of the shoes is all that is required for a fracture like that.”

“Q. No use to go and see a doctor at all?”

“A. Not a bit.”

“Q. Was not any necessity for having the bone set?”

“A. There was no necessity for the bone was not out of place” (Ap. p. 594).

The doctor further testified that the fifth metatarsal bone is not a very important bone in the foot (Ap. p. 593), and on cross examination:

“Q. What result would you expect from the fracture of that kind if you had given it a treatment?”

“A. Such a fracture should result in the complete cure.”

* * * * *

“Q. Within what length of time should it be a complete healing?”

“A. This disability is ordinarily considered to be about three or four weeks” (Ap. p. 595).

No other medical testimony was offered.

During the progress of this case Jack Miles suddenly died in Tacoma on October 17, 1925, and his widow was substituted as a Claimant and filed an additional claim for \$10,000.00 upon the ground that the death of said Claimant had resulted from the conditions complained of on board the "Victoria," that is, the close quarters and food. Like most of the contentions in this case this claim was without any foundation whatsoever. Dr. Perry, Coroner of Pierce County, held an autopsy upon the Claimant, Miles, and found that he had died directly from a cerebral hemorrhage. Dr. Perry found that Miles' vital organs were all in perfect condition, excepting that he was suffering from sclerosis and hardening of the arteries which were the secondary causes of his death (Ap. pp. 1075-1076). There was no connection whatsoever between this man's injury or the living conditions on the steamship "Victoria" and his subsequent death.

It appears that following Mr. Miles' return to Seattle after completion of the voyage of the "Victoria" he did in fact resume his occupation as an interior decorator and painter, working at the Winthrop Hotel in Tacoma and the Donnelly Hotel in Tacoma.

The present administratrix of the estate of Jack Miles was married to him on March 15, 1925, something over six months after he claims to have sustained this minor injury to his foot on the "Victoria" (Ap. p. 1063).

We respectfully submit that the evidence entirely fails to show any actionable negligence on the part of the Petitioner in connection with the slight injury to the Claimant's foot. At most the injury complained of was of a minor nature with a disability at the outside not exceeding three to four weeks. There was no showing that Claimant lost any earnings during this period of disability. He had been working as a carpenter in the mines at Nome and upon his return to Seattle he had no regular employment, nor is there any showing that he could have obtained employment. We think this claim entirely fails both from lack of proof of actionable negligence and from lack of proof of any damage.

The Commissioner, finding against the Claimants on every issue presented in these proceedings and recommending as a Conclusion of Law that the claims, and each of them, be dismissed, further recommended that each side stand its own costs. The Lower Court in affirming the Findings and Conclusions of the Commissioner entered a decree disallowing costs to the Petitioner. It is a settled rule in admiralty that costs will follow the decree except in exceptional cases where in the discretion of the trial Court costs may be disallowed. The rule is stated in *Benedict on Admiralty*, 5th Ed., Sec. 435, as follows:

“Costs are always in the discretion of the Court. This discretion, however, is a judicial discretion and though an appeal will not lie on

a question of costs alone, an Appellate Court, in passing on the merits, will upon proper assignment of error, correct an abuse of discretion or a departure from settled principle in the disposition of costs. Costs generally follow the decree, but circumstances of equity, of hardship, of oppression or of negligence induce the Court to depart from that rule in a great variety of cases.”

In the case at bar these Claimants asserting a demand, which has been found to be entirely without justification, both by the Commissioner and his Hon. Judge Dietrich, commenced thirty separate actions in the State Court and were threatening twelve additional actions in said court. To avoid this great multiplicity of suits and the great cost incident thereto, and to protect the Petitioner against possible judgments far in excess of the appraised value of the vessel and her pending freight, the Petitioner was forced to commence this proceeding at very considerable cost. A very large portion of the cost incident to the commencement of the Limitation Proceedings amounting to close to \$1000.00 will have to be borne by the Petitioner in any event. To disallow taxable costs incurred by the Petitioner in a suit of this character where there are no equities in favor of the Claimants would be merely to encourage the commencement of these unfounded suits. This matter being before this Court, in Admiralty, as a trial *de novo*, it has full power in its discretion to correct any errors in the decree below even though the Petitioner herein did

not take a cross appeal. This rule is so well settled as to not require any citation of authority.

We respectfully submit that the decree of the Lower Court should be affirmed in all respects excepting that the Petitioner's taxable costs in the Lower Court and in this Court should be allowed.

Respectfully submitted,

LAWRENCE BOGLE,

CASSIUS E. GATES,

Proctors for Appellee.

No. 5050.

United States Circuit Court of Appeals for the Ninth Circuit

2

In the Matter of the Petition of the
ALASKA STEAMSHIP COMPANY,
a corporation, owner of the Steamship
"VICTORIA," an American Vessel,
for Limitation of Liability,

Petitioner and Appellee,

C. L. ANDERSON and Forty-two Others,

Claimants and Appellants.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEE

LAWRENCE BOGLE,

CASSIUS E. GATES,

Proctors for Appellee.

FILED

OCT 17 1927



United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of the Petition of the
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Petitioner and Appellee,

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UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEE

This proceeding was commenced by the Alaska Steamship Company, owner of the steamship "Victoria," for limiting its liability, if any, on account of any loss, damage or injury arising on voyage 140 of said steamship "Victoria" from Nome, Alaska, to Seattle, Washington.

In its petition for limitation of, and exemption from, liability the said Alaska Steamship Company, appellee herein, alleged that it was the owner and operator of the steamship "Victoria"; that said vessel sailed from the port of Nome, Alaska, on August 22, 1924; and after touching at various way ports, arrived at Seattle, Washington, on September 4, 1924; that at the time of leaving Nome, Alaska, it had on board 56 steerage passengers; that she thereafter called at Dutch Harbor on August 25th, taking on passengers, called at Akutan on the same date, taking on cargo and additional passengers, called at False Pass on August 26th, took on cargo and additional passengers, called at Seward, Alaska, where she took on cargo, ship's supplies and additional passengers, and on August 30th called at Latouche, Alaska, taking on additional passengers, called at Drier Bay on said August 30th and took on additional cargo and passengers, and sailed thence to the Port of Seattle; that at the time of leaving Drier Bay she had 342 passengers, of whom 190 were steerage passengers. That on September 5, 1925, 42 persons claiming to have been steerage passengers on said vessel on said voyage filed a demand with the petitioner, Alaska Steamship Company, for \$250.00 each for alleged breach of contract of carriage on said voyage (Ap. p. 2); and that thereafter 30 of said persons, who had filed such demand, commenced separate actions against the said Alaska Steamship Company in the State Court claiming damages in the sum of \$1000.00 each for alleged

breach of contract of carriage; that 12 additional suits were threatened claiming damages in the sum of \$1000.00 each, and that if any liability existed for or on account of breach of contract on said voyage that the total of such claims would far exceed the value of the said steamer and her pending freight at the termination of said voyage (Ap. p. 5). The said petition, while denying any breach of contract on the said voyage of said vessel, alleged that if such breach did occur, or any other damage was done on said voyage, that the same was without the privity and knowledge of the Petitioner, and Petitioner sought the benefits of the Limitation of Liability Statutes of the United States. The petitioner claiming both an exemption from, or in the alternative, a limitation of, liability, prayed for the appointment of appraisers and for the issuance of other processes as in such cases provided.

After due notice to the attorney for the Plaintiffs in the suits pending in the State court, the lower court appointed three appraisers to appraise the value of said steamship "Victoria" and her pending freight at the termination of said voyage, and such appraisement was duly returned, fixing the value of said vessel and her pending freight at \$79,820.61. A bond for said amount was subsequently approved and filed, and an order entered restraining the further prosecution of the State court actions; ordering that due notice be given and claims filed with the Hon. A. C. Bowman, U. S. Com-

missioner, on or before November 1, 1924 (Ap. p. 12).

On or before said date 43 claims for \$1000.00 each were filed with the U. S. Commissioner for alleged breach of contract of carriage and one claim was filed for alleged personal injury sustained on the aforesaid voyage. In due time objections and exceptions were filed by the Petitioner to each of said claims; and thereafter on April 23, 1925, the cause being at issue, an order was entered referring the same to the Hon. A. C. Bowman, U. S. Commissioner, for the taking of testimony, with directions to return the same together with the said Commissioner's Findings of Fact and Conclusions of Law. In pursuance of said order of reference voluminous testimony was taken on behalf of the parties thereto and on July 15, 1926, the Commissioner returned the same together with his Findings of Fact and Conclusions of Law to the lower court. The Commissioner found:

“Paragraph 3 of the Amended Answer and claims sets forth the terms of the contract of carriage claimed to have been entered into between the claimants and the Petitioner for the voyage in question.

I find no testimony in the record to support the contract above mentioned, and the testimony offered in the case must be considered as applying to the duty imposed on a common carrier of passengers to the claimants.

I find from the testimony in the case that

the several claimants purchased from the agent of the Petitioner at Nome, Alaska, tickets for the passage from Nome to Seattle, on the steamship Victoria which sailed from Nome bound for Seattle, on August 22, 1924. That these tickets cost the claimants fifty dollars each and bore the legend 'Good for one STEERAGE passage as indicated'. These tickets were accepted by the officers of the steamship Victoria, and the holders of the tickets were assigned quarters in the steerage department of the vessel, where standee bunks were arranged; the claimants selecting their bunks as they came aboard.

That No. 1 steerage had accommodations for 72 passengers, and at the time the Victoria left Nome on the voyage in question there were 56 steerage passengers on board, among whom were the claimants in this case.

After leaving Nome the Victoria touched at several way-ports where additional steerage passengers were picked up, to the number of 134, making the total number of steerage passengers 190, 102 of whom were Orientals.

The evidence shows that the vessel had authority from the Local Inspectors to carry 284 steerage passengers in Nos. 1 and 2 steerage departments.

That each of the claimants had made the voyage north from Seattle to Nome in the steerage of the Victoria in the spring of the year 1924, and that there were a greater number of passengers in the steerage at that time than on the return trip in August, 1924. Further, that a number of the claimants had made trips to Alaska and return, in the steerage of the Victoria, for many years.

The claimants made the voyage to Alaska for the purpose of prospecting as miners or as

wage earners; a number of them being under contract to work for the Hammond Mining Company located at Nome.

Due to a strike of employees of the Hammond Mining Company participated in by some of the claimants and other of the claimants affected by the closing down of operations of the company, returned to Seattle on the Victoria on the voyage in question.

In support of their claims for damages, the claimants in their testimony specify certain conditions which they claim existed on the vessel during the voyage, namely:

(1) That the food was not fit for human consumption and that they were unable to eat it, and were forced to go hungry or purchase food from under-stewards or waiters;

(2) That the steerage was not properly ventilated, causing headache and other disagreeable reactions;

(3) That the steerage was not kept clean; vomit from seasick passengers not being promptly removed, causing offensive odors to permeate the steerage;

(4) That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health;

(5) That gambling was allowed to be carried on in the dining room (on the deck above the steerage), during the day time and night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night.

It does not appear from the testimony that the claimants or any one of them complained to the captain or other deck officer about the

above mentioned conditions, or asked that they be remedied. It appears clearly from the testimony that the master of the vessel and other deck officers made inspection visits to the steerage at least once each day.

I find from the testimony presented, that

(1) The Victoria was staunch, properly manned, equipped and victualled for the voyage in question;

(2) The food of the first class passengers, officers, crew and steerage was of the same quality (with the exception that the coffee of the crew and steerage was of a lesser grade), and cooked at the same time and in the same vessels;

(3) Owing to the limited capacity of the dining room, it was not possible to seat all the steerage passengers at one time, and several seatings had to be made;

(4) It was a matter for the passengers to decide who was served first or otherwise;

(5) The food was served "family style," and the passengers helped themselves.

I find from the testimony that the ventilation of the steerage of the Victoria was not other or different than had been in use on prior voyages of the Victoria; that the hatches were open whenever the weather permitted, in addition to the customary deck ventilators.

I further find that the steerage passengers were not limited in their movements about the various decks of the vessel; that many of them used the smoking and lounging room of the first class passengers, without objection on the part of the officers of the ship."

With reference to the personal injury claim filed by the Claimant, Jack Miles, the Commissioner found:

“The claimant Jack Miles in his amended answer and claim asks for damages for breach of the contract of carriage and also for personal injury during the voyage.

I find from the testimony that during the voyage the claimant Jack Miles was employed by the officers of the vessel to assist in stowing certain cargo taken on at way ports. That during the process of stowing certain barrels in one of the after holds, Miles with two other men similarly employed rolled one of the barrels to its proper place, leaving it for another man to block in position; that he turned and walked toward the opening of the hatch to help care for other cargo coming in; that the barrel which he had just left rolled and struck his left heel, breaking the outer bone of the left foot. Miles also testified that the hold in which he was employed as stevedore was not properly lighted; that this fact contributed to his injury. It also appears from the testimony that the person to whom Miles delivered the barrel which caused the injury, did not properly block the barrel in position which was a part of his duty. It also appears from the testimony that Miles did not complain of the improper lighting to the officer of the ship in charge of the gang of men with whom Miles was working. It further appears from the testimony of the physician who examined and treated the injury to Miles' foot after reaching Seattle, that the injury was not of a serious nature and that the wearing of a shoe would hold the bones in proper position for healing.

During the taking of testimony in the case the claimant Jack Miles died from cerebral

hemorrhage at Tacoma, and letters of administration were taken out to administer his estate by his widow, Helen G. Miles, as shown by the record.”

From these Findings the U. S. Commissioner recommended as his conclusions of law that the claims filed and verified personally by 22 of the claimants be dismissed

“For the reason the testimony as to damages sustained by said Claimants is not convincing and the testimony of the Petitioner shows by a fair preponderance that said Claimants are not entitled to damages in any sum for breach of the implied contract of carriage.” The Commissioner further recommended as his conclusion of law that the claims filed on behalf of 21 of said steerage passengers which were verified by their proctor be dismissed for the reason, 1st, “the amended answer and claims were verified by their proctor without cause being shown for such verification as required by the Admiralty rules of this court”; and 2nd, “for the reasons set forth in paragraph 1 of these conclusions” (Ap. p. 1102).

As to the personal injury claim of Jack Miles, the Commissioner recommended that the same be dismissed. The Commissioner further recommended that each party pay the costs incurred by such party (Ap. p. 1103). This latter conclusion was clearly erroneous, as will be argued in the subsequent portion of this brief.

Thereafter, and on July 20, 1926, the Claimants' objections and exceptions to the Commissioner's Findings of Fact and Conclusions of Law were duly filed and the cause was thereafter submitted to the Hon. Frank S. Dietrich, sitting in the lower court, as a district Judge, upon oral argument and written briefs, and on August 25, 1926, Judge Dietrich's memorandum decision on the merits was filed herein sustaining and affirming the Findings and Conclusions of the said Commissioner.

Judge Dietrich's memorandum decision on the merits follows:

"The issues were referred to a Commissioner, with directions to receive proofs and to report the same with findings of fact and conclusions of law. To findings wholly adverse to their claims, claimants have filed numerous exceptions, requiring an examination of the entire record. Such examination I have made.

A more extreme case of conflicting testimony it would be difficult to imagine. All the witnesses were 'interested.' Claimants first produced nine of their own number who testified that the food and sanitary conditions on the ship were shockingly bad. In defense the petitioner called most, if not all, of the ship's officers, who denied substantially all the specific charges of misconduct and described the food and sanitary conditions as being good. In the guise of rebuttal claimants then produced seven more of their number, whose testimony was along practically the same lines as that of the first nine.

In view of the conditions, it is greatly to be regretted that in taking the testimony care

was not exercised to follow rules which are designed in a measure to counteract the natural tendency of 'interested' testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court undoubtedly these rules would have been enforced, but apparently it was assumed that the Commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight.

The issues are well stated in the Commissioner's report, and no useful purpose would be subserved by an abstract of the voluminous testimony. In resolving the sharp conflict between the two groups of witnesses the Commissioner had the advantage of seeing and hearing the witnesses; and therefore a measure of weight attends his findings.

Of great significance, I think, is the fact that with scarcely an exception, the claimants made no complaint to the ship's officers during the voyage. If, as they now testify, the food was so rotten and so manifestly unfit for human consumption, and if the conduct of the Orientals at the table was so outrageously repulsive, and if the air in the sleeping quarters was so intolerably foul, and the floors in both the sleeping and dining quarters and the toilets were so unspeakably filthy, it is incredible that the passengers would have meekly submitted. There were eighty-eight white passengers in the steerage. Insofar as it appears, forty-six of them never made complaint to the officers during or after the voyage, and of the forty-two who are

here asserting claims, admittedly no one made complaint during the voyage to any one of the general officers in respect to the food or general sanitary conditions, and but few made any complaint whatever even to a subordinate. They were not timid, unsophisticated women and children; apparently they were men of experience, conscious of their rights and of a temper to assert them. I am unable to believe that, if such conditions existed as they describe, they would have gone hungry for days and lived in such filth without vigorous and organized protest. The case they make is thought to be contrary to reason and general experience; and upon the whole I am inclined to concur in the Commissioner's conclusions. Doubtless, there was some gambling in the card games, but here, too, it is thought claimants have greatly exaggerated the effect upon their comfort. The steerage was crowded, but the rules were relaxed, and without serious interference steerage passengers were permitted to frequent and occupy other parts of the vessel ordinarily reserved for passengers of other classes."

With reference to the claim of Jack Miles for personal injury and the claim of Helen G. Miles as administratrix of the estate of Jack Miles, deceased, Judge Dietrich finds:

"The evidence upon this claim is extremely meager, and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was, it was the negligence of a fellow servant, for which, under the established rule in this Circuit, recovery cannot be had." (Ap. p. 1114.)

On September 22nd, 1926, final decree was entered in accordance with the memorandum decision

of Judge Dietrich dismissing the claims without cost. On December 21st, 1926, notice of appeal was filed and the cause is now before this court upon the typewritten Apostles on appeal.

All of the testimony on behalf of the claimants and all the testimony on behalf of the Petitioner was taken before the Hon. A. C. Bowman, United States Commissioner. Under the well settled rule applicable in admiralty, the findings of the Commissioner from conflicting evidence upon questions of fact, will not be disturbed by this court unless clearly against the weight of evidence. If such findings are supported by competent evidence, they will not be disturbed on appeal.

Luckenbach S. S. Co. vs. Campbell, 8 Fed. (2nd) 223.

Cary-Davis Tug & Barge Co. vs. United States, 8 Fed. (2nd) 324.

And where such findings of fact have been reviewed by the District Court and affirmed in all respects, this court will not disturb the same except for very apparent and manifest error.

“The question is one of fact depending very largely upon the credit to be given to the various witnesses seen and heard by the Commissioner. Under these circumstances not only is there very reasonable presumption in favor of the Commissioner’s finding and the decree of the District Court based upon such finding, but this Court would not be justified in setting aside or modifying the decree unless there clearly appears to have been error or mistake in the

finding of the Commissioner or the conclusion drawn therefrom.”

United S. S. Co. vs. Haskins, (C. C. A. 9th Circuit) 181 Fed. 962 at page 964.

ARGUMENT.

For the purpose of clarity and argument, we will in this brief designate the Appellee in this court as Petitioner and the Appellants in this court as Claimants.

This being a proceeding for limitation of liability, the cause is initiated by the filing of the Petition setting forth the facts showing the Petitioner's right, first, to a total exemption from all liability, and second, in the event the exemption is denied, then the Petitioner's right to limitation of its liability. Two distinct issues are thus presented.

The S. S. "Hewitt," 284 Fed. 911.

The Claimants may either admit the Petitioner's right to limitation, contest Petitioner's right to total exemption, or Claimants may contest both issues. The basis of the Claimants' right to enter a contest upon either issue of exemption or limitation is predicated upon a claim filed in the limitation proceeding. Claims filed in limitation proceedings are in the nature of original libels and must set forth the

facts upon which the Claimants' cause of action against the Petitioner is predicated, with the same degree of distinctness and clearness that is required of an original libel in admiralty.

In Re Davidson S. S. Co., 133 Fed. 411;
The Pere Marquette, 203 Fed. 127.

The burden of proving the allegations of the claims is always upon the Claimants to the same extent that the burden of proving the allegations of an original libel in admiralty is upon the libellants,

"The John H. Starin," 191 Fed. 800;
The "Titanic," 225 Fed. 747;
The 84-H, 296 Fed. 427.

While the burden establishing Petitioner's right to limitation of liability is always upon the Petitioner, this issue was not contested in the lower court, and in any event, it appearing that the total amount of claims filed with the Commissioner were less than the appraised value of the said vessel and her pending freight, the issue of limitation of liability becomes immaterial.

The Santa Clara, 174 Fed. 913.

In the lower court the Claimants moved for a dismissal of the limitation proceedings upon the ground that the total amount of claims filed were less than the appraised value of the said vessel and her pending freight at the termination of the voyage. The lower court denied this motion.

“The motion must be denied. From the statements in the several claims filed, it is clear that the conditions that obtained in the steerage was common, and if these claimants are entitled to recovery, other passengers may have equal right and the Court cannot say that if forty-three claimants are entitled to \$45,000.00 exclusive of costs, the remaining One hundred and forty-five claimants would not be entitled to more than the difference between \$45,000.00 and \$79,821.60, the value of the ship and her pending freight. * * * The order of this Court fixing or limiting the time within which claims may be filed is not a bar to the prosecution of an action within the period limited by statute if this proceeding should be dismissed. Hence, there is a probability of claims in excess of the value of the vessel and pending freight and the right of limitation is not defeated by the fact that the claims upon which suit has been commenced do not amount to the admitted value of the ship where there is a probability that there may be other claims. *The Defender*, 201 Fed. 189.” (Ap. p. 55.)

The right of a petitioner to maintain limitation of liability proceedings is to be determined from the probable or possible amount of claims *at the time the proceeding is initiated*. If it appears clearly *from the petition* that the total of all possible claims cannot equal the appraised value, then limitation proceedings clearly would not lie (*Shipowners' & Merchants' T. Co.*, 218 Fed. 161), but if at the time the petition is filed there is a possibility that the total of all claims may exceed the value of said vessel and her pending freight, then the proceedings will lie and the fact that the total amount of claims

subsequently filed do not equal the appraised value of the vessel and her pending freight would not oust the court of jurisdiction.

The George W. Fields, 237 Fed. 403;

The Defender, 201 Fed. 189;

Benedict on Admiralty, (5th Ed.) Sec. 495.

In this case, it is clear, as stated by Judge Net-erer, that the total amount of possible claims would far exceed the appraised value of the vessel and her pending freight provided the claims actually asserted at the time the petition was filed were valid. At said time forty-three claims had been asserted claiming damages in the sum of \$45,000.00. There were one hundred and forty-five additional steerage passengers, similarly situated to those filing claims and on the basis of the claims filed, these additional passengers would be entitled to \$145,000.00, or a total of all possible claims of \$190,000.00, being far in excess of the appraised value of said vessel and her pending freight. In answer to this contention, Claimants assert that there was limitation in the steerage passenger tickets limiting their time for filing claims to a period of ten days from the date of the vessel's arrival at destination, which limitation the Claimants assert was reasonable and valid. There are two obvious answers to this contention.

First: It appears from the Claimants' own brief that of the one hundred and ninety steerage passengers, one hundred and two were Orientals, and that no steerage ticket was issued to these Orientals,

so they of course were not subject to this limitation of time within which to file claim.

Second: The validity of the ten day limitation for filing claims is dependent on whether or not the same is under all the circumstances reasonable. In other words, the limitation contained in the passenger tickets is a matter of defense to be asserted by the carrier. It is not a matter of absolute defense, but is one depending upon all the facts and circumstances of the voyage and would have to be litigated in the proceedings.

Third: The lower court in a prior case involving the identical ten day limitation contained in passenger tickets *on this same vessel* on this identical voyage held the same to be unreasonable and void.

Blackwell vs. Alaska S. S. Co., 1 Fed. (2nd) 33A.

The claimants further contend that the total amount of claims filed being less than the appraised value of the vessel and her pending freight, that the Petitioner is not entitled to contest the issue of exemption, but on the contrary the Claimants are entitled, without further proof, to a decree for the full amount of damages claimed. The absurdity of this contention is apparent on the face of it.

In the first place, it presupposes that upon filing a petition of limitation, there is an absolute admission of liability concerning which limitation is sought, or stated in another way, that a Petitioner,

in seeking the benefit of the limitation of liability statutes, is deprived of any right to contest either its liability or the amount of the claim. Under the American law it is established that a shipowner seeking the benefit of the limitation of liability statutes may either admit liability and waive the right of exemption and seek merely the limitation of such liability, or he may deny any liability, claiming a total exemption therefrom and in the alternative, seek a limitation of liability, in the event his claim for exemption is denied.

Benedict on Admiralty (5th Ed.), Sec. 485.

In this case the Petitioner expressly denied all liability and prayed for a total exemption therefrom and in the alternative, asked for a limitation of liability in the event his claim for exemption should be denied.

The fact that the total claims filed were less than the appraised value of the vessel and her pending freight has no bearing upon this issue.

Claimants' further contention that the mere filing of a verified claim is sufficient to establish the same without further legal proof is clearly unfounded. The burden of proof as to liability of the Petitioner and the amount of damages sustained by the Claimants is always upon the Claimants.

"The John H. Starin," 191 Fed. 800.

Rule 85 in Admiralty of the lower court pro-

vides that proof of claim shall, in the first instance, be by affidavit specifying the grounds and the amount, etc., and that such proof shall be deemed sufficient, unless the claim be objected to by the Petitioner or some other Claimants, in which event "any claims so objected to must be established by a further legal *prima facie* proof or notice to the objecting party as in ordinary cases."

Petitioner herein having filed due and timely objections to each of the claims, the burden of establishing liability and the amount of damages sustained by each Claimant was clearly upon the Claimants.

In the case at bar, out of forty-three claims filed, only nine claimants appeared and testified in support of such claims and as found by the Commissioner and affirmed by Judge Dietrich, such proof neither established liability of Petitioner or any basis of damages.

We will now discuss the question raised by this appeal as to the merits of the claims herein filed. There are two classes of claims to be considered.

First: Claims for breach of contract of carriage and Second, claims for personal injury and death of Jack Miles.

We will discuss these in order.

CLAIMS FOR BREACH OF CONTRACT OF CARRIAGE.

In view of the adverse findings of both the Commissioner, before whom all the testimony was taken, and his Honor Judge Dietrich, who made a full review of the record upon the exceptions of the Commissioner's findings and conclusions, we need only consider the question as to whether or not such findings and conclusions of the two lower tribunals are supported by any competent evidence. In considering this question, we will make no attempt to follow the Claimants' brief herein, for the simple reason that said brief is written very largely entirely apart from the record. As the burden was upon the Claimants to establish by a preponderance of evidence, a breach of contract and the damages accruing therefrom, to each of the Claimants, the discussion should be limited strictly to the facts disclosed by the record in this case. Proctor for Claimants has made no attempt to so limit his argument. As stated by Judge Dietrich, there was a sharp conflict between the evidence given by the nine witnesses testifying in chief for the Claimants and the nineteen witnesses who testified on behalf of the Petitioner upon the issues of fact involved in this case. The Claimants' witnesses testified to conditions in the sleeping quarters, eating quarters and to unsanitary conditions aboard this vessel which were unbelievable. The testimony of these witnesses was contradictory in many respects and was grossly exag-

gerated upon all the essential issues in this case. The uniformity of the testimony is easily explained in the manner in which the same was introduced. In view of the fact that all of the witnesses were interested, that is, were asserting claims in this proceeding, Petitioner demanded that prospective witnesses be excluded. This demand was refused by proctor for Claimants and was not enforced by the Commissioner. Testimony was brought out very largely by leading questions propounded by proctor for Claimants, over the objection of the Petitioner. Judge Dietrich's criticism of the proceedings before the commissioner was well warranted.

“It is greatly to be regretted that in taking the testimony, care was not exercised to follow rules which are designed, in a measure, to counteract the natural tendency of interested testimony. Prospective witnesses should have been excluded and leading questions scrupulously avoided. If the testimony had been taken in court, undoubtedly these rules would have been enforced, but apparently it was assumed that the commissioner lacked the requisite power, and not only did claimants decline a request of the petitioner that the witnesses be separated, but over objection often repeated, they persisted in putting questions in the most leading form. I am inclined to think that even now in innumerable instances, the objections should be formally sustained; but if allowed to stand, answers thus educed can have but little weight.” (Ap. p. 1111.)

The undisputed testimony in this case shows that the S. S. “Victoria” had been operating as a

freight and passenger vessel since the year 1903, between Nome, Alaska, and Seattle. During this entire time, the steerage sleeping quarters had been located on the deck below the tween decks and the steerage dining room and toilets located on the tween deck. The "Victoria" was one of thirteen combination freight and passenger vessels operated by the Alaska Steamship Co. between Seattle and Alaskan ports. Her steerage compartment had been inspected by the local United States inspectors and a certificate (Petitioner's Exhibit 5) issued by said inspectors permitting her to carry 204 steerage passengers. This last certificate was dated May 2nd, 1924. She was subsequently inspected on May 31st, 1924, and an additional certificate issued for the carriage of eighty additional passengers, or a total of two hundred and eighty-four steerage passengers (Ap. p. 794). Before these certificates were issued the United States customs officials had inspected the quarters and certified the cubic space of the same to the United States inspectors (Ap. p. 795, p. 798). The travel between Seattle and Nome is extremely heavy on the first trip in the spring northbound and the travel between Nome and Seattle southbound is extremely heavy on the last trip in the fall. These steerage passengers (Claimants herein) were largely prospectors, mine operators and laborers whose operations were limited to the open summer season, the balance of the year the port of Nome being ice-bound. In the spring of 1924 the S. S. "Victoria" carried northbound on the trip, leaving Seattle in

June, a total of 257 steerage passengers; with one or two exceptions only, all of the Claimants in this proceeding were passengers on this northbound trip of the "Victoria" in the spring of 1924. Without any exception every one of the Claimants had travelled previously in the steerage of the "Victoria" between Nome and Seattle, some of them as often as twice a year during the last twenty years (Ap. p. 506, p. 1052). It is admitted that the sleeping quarters, the dining quarters, the toilets and all other conditions complained of by the claimants herein were in the same location and in the same conditions as existed on all previous voyages made by said claimants on said vessel.

Despite this admitted fact, an examination of the claims herein show that the Claimants and each of them are asserting a special contract of carriage based upon express representations alleged to have been made to each of said claimants by the agent of the Petitioner at Nome, Alaska, at the time the steerage passenger tickets were purchased from said agent. The agent denied making any express representations as to the food, quarters, etc., as an inducement for the sale of these steerage passenger tickets (Ap. p. 672) and not a single claimant testified to any such express representation or agreement. The claimants and each of them admitted full knowledge as to the steerage quarters aboard this vessel and their right of recovery, if any, must be based upon a breach of the Petitioner's implied contract as a carrier to furnish adequate accommo-

dations such as are customarily furnished to steerage passengers in said trade and to keep the same reasonably clean and sanitary during the course of the voyage and to furnish proper and sanitary food. This, of course, does not mean that the Petitioner was to furnish quarters equal to those furnished first class passengers, nor to furnish food of the same quality and variety.

“It is obvious, that to a certain extent, some of the discomforts complained of were incidental to a voyage of this description by passengers who had only the right to a second cabin passage. * * * That those who occupied the second cabin should suffer some discomfort from foul air, etc., was unavoidable, for a considerable number of the passengers could not be placed in a single cabin tween decks without being far less agreeably situated than if they had occupied state rooms on the deck above.”

The Sonora, Fed. Case No. 746.

At the time of leaving Nome, Alaska, on August 22nd, there were fifty-six white passengers in the steerage of this vessel. These passengers consisted very largely of employees of the Hammond Mining Co. at Nome, Alaska, who had gone out on strike at said mine, resulting in the closing of the same before the end of the season. These passengers were all placed in the forward steerage compartment, having a capacity of seventy-two passengers. This compartment was adequately ventilated by two cowl ventilators which went through to the main deck of the steamer and by No. 1 hatch, which was kept open at

all times during the voyage, with the exception of one night when it rained (Ap. pp. 703 to 706. Pet. Ex. 2). At the time of leaving Nome, the vessel had sixty-seven first class passengers. She called at Unalaska, took on board seventeen additional first class passengers, and on August 25th called at Akutan, where she took on cargo, one steerage and one first class passenger, and on August 26th, called at False Pass, where she took on cargo, eighteen first class and sixty-four steerage passengers. She next called at Seward, Alaska, where she took on thirty first class passengers, including Governor Sulzer of the Territory of Alaska and two steerage passengers. She next called at Latouche on August 30th, taking on eight first class and thirty-two steerage passengers. She next called at Drier Bay, taking on eleven first class and thirty-five steerage passengers. At the time of sailing from Drier Bay for Seattle, she had on board one hundred and fifty-two first class and one hundred and ninety steerage passengers. Of the steerage passengers, one hundred and two were Orientals and eighty-eight white passengers. After leaving Nome, standee berths were placed in No. 2 steerage for the accommodation of the additional steerage passengers. This compartment is ventilated by four large ventilators, two forward and two aft, and by No. 2 hatch, which was kept open, excepting when the condition of the weather prevented (Ap. pp. 703-706. Pet. Ex. 2). Shortly after leaving Drier Bay, a paper or agreement of some kind was circulated among the steerage passengers and was signed

by forty-two or forty-three such passengers, *all of whom had taken passage at Nome, Alaska*. The other forty-five or forty-six white passengers refused to sign the paper and none of the one hundred and two Orientals signed the same. This paper contained some form of agreement or representation which was torn off before the same was offered in evidence in this case (see Cl. Ex. C). Demand was made for that portion of the petition which had been torn off, which demand was refused by the Claimants (Ap. p. 754).

Claimants Berglof and Littrel drew up this paper and circulated it among the passengers (Ap. p. 576). Their signatures appeared first on the paper. Claimants' Exhibit C shows the signature of Berglof and Littrel near the bottom of the page. It further shows that whatever was written at the top of the page, above the signatures of these two Claimants, has been cut off and what little remains of the original sheet, with the agreement eliminated, has been pasted on to the bottom of what was originally the *second* page of signatures. That the paper originally contained a form of agreement is admitted by Claimants' witnesses (Ap. p. 622).

It appears from the evidence, however, quite clearly that this paper was circulated upon the representation that the steerage passengers signing the same would get a refund of their passage money (Ap. pp. 965-966, p. 754). The signers of this paper now appear as Claimants in this proceeding, although

only nine of said signers testified in chief as witnesses for the Claimants. Of the signers to this paper, five were seamen formerly employed by the petitioner who had deserted one of their vessels at Nome, Alaska, for the purpose of obtaining higher wages in the mines (Ap. pp. 771 to 777). One at least was an employee in the steerage department whose sole duty was to keep the steerage sleeping quarters properly swept up and cleaned. One complaint made by the Claimants is that this man, also a Claimant, did not perform his duty. At least two of the Claimants were former employees in the steerage department of this vessel—one of whom had worked several seasons (Ap. p. 537), and the other had worked on the northbound voyage in June of the same year (Ap. p. 930).

The various allegations of the claims herein are concisely stated by the United States Commissioner as follows:

First, that the food was not fit for human consumption and that they were unable to eat it and were forced to go hungry or purchase food from under stewards or waiters.

Second, that the steerage was not properly ventilated, causing headache and other disagreeable reactions.

Third, that the steerage was not kept clean, vomit from seasick passengers not being properly removed, causing offensive odors to permeate the steerage.

Fourth: That employees of the vessel scattered chloride of lime on the moist deck of the steerage, causing the formation of chlorine gas in sufficient quantity to be dangerous to health.

Fifth: That gambling was allowed to be carried on in the dining room (on the deck above the steerage) during the daytime and the night time, depriving them of a place to lounge during the day and disturbing their slumbers during the night (Ap. p. 1099).

We will consider their contentions briefly in the order designated by the Commission.

1. THAT THE FOOD WAS NOT FIT FOR HUMAN CONSUMPTION AND THAT CLAIMANTS WERE UNABLE TO EAT IT.

Testimony shows without contradiction that the S. S. "Victoria" was equipped with three modern cold storage compartments and one cooler. The uncontradicted evidence of Mr. Nelson, the port steward of the Petitioner, is that all supplies for this and other vessels of the Petitioner's fleet were purchased through his office upon requisition of the chief stewards of the various vessels. That his Company purchased one quality only of provisions for these vessels, with one exception; that all of the fresh meats, vegetables, eggs, bacon and staple supplies are of the very best quality for use by the first class, steerage and crew (Ap. p. 813); that a slightly cheaper

grade of coffee is purchased for the crew and steerage than that purchased for the first class passengers (Ap. p. 813). That all other provisions are of the same quality. A complete list of the provisions supplied by the S. S. "Victoria" at the time she left Seattle for Nome was introduced in evidence as Petitioner's exhibit A-20 and there is no segregation whatever as between first class, steerage and crew provisions.

On the southbound voyage, the chief steward bought additional fresh meats at Seward and Lataouche, to be on the safe side (Ap. p. 680). On this round trip voyage the "Victoria" was supplied for 25,000 meals and there were actually served 22,000, leaving a surplus of 3,000 meals upon her arrival at Seattle (Ap. p. 821). As to the quantities supplied at each meal, or rather per day per passenger, it appears that during the late war, the United States Food Administrator obtained accurate data from numerous steamship lines upon which it issued instructions to operators of U. S. Shipping Board vessels (which operators included the Petitioner during the said war) providing for 105.54 ounces of food per day per passenger. On this particular trip of the "Victoria" her records show that she supplied 111.27 ounces per day per passenger (see Pet. Ex. 8, Ap. p. 819).

The testimony of A. Brown, chief cook, shows that on this vessel all of the food supplies were kept in the same compartment, all of the meats and vege-

tables being kept in the same cold storage compartments, where it was impossible for them to become tainted; that all of the food was cooked in the same kitchen on the same range in the same utensils, and there was no segregation or difference between the food supplied the first class passengers, the steerage passengers and the crew (Ap. p. 695). The only difference was in variety, and not in quality or quantity. This testimony is corroborated by the chief steward as to the adequacy of the supply of the food (Ap. p. 679), as to the quality of the food furnished the first class and steerage (Ap. pp. 678-9), and by the steerage steward (Ap. p. 742); by the chief baker (Ap. p. 836); by the storekeeper (Ap. p. 840); by the second steward (Ap. p. 856), and by the chief butcher (Ap. p. 866). It is true that in the steerage compartment the meals are served "family style," there being no seat checks, but this is customary in all steerages (Ap. p. 682). It is contended by Claimants that from time to time they purchased food from some members of the steerage steward's department or from the cooks. This is denied by the steerage employees and the cooks, and an examination of the Claimants' testimony in this respect shows that most of the food claimed to have been purchased consisted of sandwiches and coffee purchased in the evening after the meals were over (Ap. p. 640, p. 666, p. 934), or for delicacies, such as chickens and fresh fruit, which are not ordinarily served in the steerage (Ap. pp. 899-900), in consideration of which the passengers gave the em-

ployees a tip ranging from 25 cents to \$1.00 (Ap. p. 900). Each and every one of the officers of this ship testified that they were in the steerage many times during the day, all of them having their uniforms on, the cap showing their official position, and that no complaint was ever made by any of the steerage passengers as to the quantity or quality of food served in the steerage, or as to any other condition alleged to have existed on board of said vessel.

2. CLAIM THAT THE STEERAGE WAS NOT PROPERLY VENTILATED.

The ship's plans (Pet. Ex. 2) shows that the steerage quarters were amply ventilated by four cowl ventilators from the outside deck, two ventilators to the tween decks and by No. 1 and 2 hatches, which were at all times kept open, weather permitting.

The chief officer testified in detail as to the ventilation and the adequacy of the same (Ap. pp. 703 to 707), and that no complaint was ever made as to the lack of ventilation; with the exception of one occasion, when a steerage passenger complained that other steerage passengers had stopped up one of the ventilators on the ground that the steerage was too cold (Ap. p. 710). This testimony is not disputed with the exception of the unlicensed testimony of certain Claimants that there was absolutely no ventilation whatever in the steerage.

It is undoubtedly true that in the space occupied by one hundred and ninety passengers there was, to a certain extent, some discomfort from close air, but this condition as stated in the "*Sonora*" case, *supra*, was incidental to passengers travelling in the steerage compartment.

3. CONTENTION THAT THE STEERAGE WAS NOT KEPT CLEAN.

It appears without contradiction that George Condell, one of the Claimants herein, was employed for the sole purpose of keeping the steerage properly swept up and cleaned. The Captain testified that he went through the steerage quarters from two to three times a day and so far as he could see, the ventilation was good and the floors and quarters were kept clean and sanitary (Ap. p. 727). During these inspections in passing through the steerage quarters, there was every opportunity for the steerage passengers to complain as to the conditions in said quarters, but no complaint was ever made (Ap. p. 730). It was his testimony that if complaints had been made or he had ascertained from his inspection, the quarters were not being kept clean and sanitary, he would have ordered the chief steward to place additional men in the steerage for that purpose (Ap. pp. 729-730). The chief steward testified that every morning during the entire voyage and as part of his regular duties, he made an official inspection of the steerage quarters for the express purpose of seeing

whether they were kept clean and in a sanitary condition (Ap. p. 684); that there were eight employees in the steerage department, to one of whom was allotted the duty of keeping the sleeping quarters clean. He had no other duties aboard this ship. If the quarters had not been kept clean, there were ample men on board in the steerage department and he would have ordered additional men into the steerage quarters for this purpose (Ap. pp. 685-686). He testified that in addition to his official inspection, he went through the steerage quarters several other times during the day.

“Q. When you were down inspecting the sleeping quarters, did any of these steerage passengers make any complaint to you?”

“A. No.”. (Ap. p. 686.)

The steerage steward testified that he went through the steerage sleeping quarters three or four times a day; that the quarters were kept clean and in a sanitary condition and that no complaint was ever made to him by steerage passengers (Ap. pp. 748-749, p. 752).

The third officer testified that he spent considerable time in the steerage quarters while off duty, as he was acquainted with a number of the steerage passengers, but no complaint was ever made to him with reference to any conditions in the steerage sleeping quarters, dining room or toilets (Ap. p. 761).

The chief pantryman testified that he visited the steerage sleeping quarters several times a day and that the same were kept clean and sanitary (Ap. pp. 781-782).

The second steward likewise testified that he made an official inspection of the steerage quarters, both eating and sleeping, every day and that the same were kept in a clean and sanitary condition and that no complaint was ever made to him by any steerage passenger (Ap. p. 853, p. 858).

4. COMPLAINT THAT EMPLOYEES SCATTERED CHLORIDE OF LIME ON THE DECK OF THE STEERAGE.

The testimony shows that chloride of lime, which is a well-known disinfectant, was placed in one place in the steerage where a passenger had been sea-sick, only on *one occasion*. Testimony by Mr. Howard, an expert chemist, was to the effect that chloride of lime in such quantity as was placed on the floor of the steerage could not have any injurious effect (Ap. p. 1085). This complaint is not seriously urged excepting with reference to the claim of Jack Miles, deceased, and we will consider the same more fully in discussing said claim.

5. THAT GAMBLING WAS CARRIED ON IN THE DINING ROOM, DEPRIVING THE STEERAGE PASSENGERS OF A PLACE TO LOUNGE DURING THE DAY AND EVENING IN THIS STEERAGE.

There were one hundred and ninety passengers in this steerage. The testimony of Claimants' own witnesses is to the effect that the Orientals kept very much to themselves. The capacity of the four tables in the dining room was forty-eight passengers. It is undoubtedly true that during the day and a portion of the nights there was cardplaying and possibly a certain amount of gambling carried on in the steerage dining room. This, however, was carried on almost entirely by the steerage passengers themselves. As stated by Judge Dietrich, Claimants' evidence as to the extent of gambling was undoubtedly exaggerated. There were signs in the steerage prohibiting gambling and the master repeatedly warned the steerage passengers to refrain from gambling (Ap. p. 735). On a long ocean voyage, it is impossible to prevent cardplaying and incidentally a certain amount of gambling. This, however, would not constitute a breach of contract of carriage, unless the steerage passengers were deprived of some rights thereby. The claim that the passengers were deprived of the use of these quarters for lounging is certainly not well taken, as the men engaged in cardplaying and gambling were all members of the steerage and entitled as such to the use of these quarters. There was some suggestion in the evidence that one member of the steerage crew was engaged in the gambling, but he was not identified and all of the members of the crew who were called denied that they took any part, either in the card playing or the gambling.

It appears without contradiction that on this particular trip the Captain had relaxed the rule universally applied on passenger vessels with reference to restricting the steerage passengers to their own quarters and the main deck forward. On this particular voyage the passengers were allowed the free run of the ship, including the first class deck space, smoking room and social hall. The testimony in this respect is uncontradicted, Captain Davis (Ap. p. 733), Chief Steward (Ap. p. 689), Purser Parker (Ap. pp. 800-801), First Officer Baker (Ap. p. 714), Third Officer Aylward (Ap. p. 762), W. W. Mason, chief baker (Ap. p. 837), S. R. Davis, storekeeper (Ap. p. 843, p. 850), E. Lowery, second steward (Ap. p. 858), Freight Clerk Lawson (Ap. pp. 872-73), and in fact is admitted by claimants' own witnesses (Ap. p. 891).

A few of the claimants make a further complaint that a large quantity of salmon was loaded in the after part of No. 2 steerage, as a result of which, said quarters were unduly crowded. Like the other complaints urged in this case, this particular one was grossly exaggerated. The fact is that 1200 cases of canned salmon was stowed against the after bulkhead to give the ship a proper trim (Ap. p. 1026). The salmon only covered half the space between the bulkhead and the after end of No. 2 hatch (Ap. p. 1023). There were 210 standee bunks in place or 20 more than the total number of steerage passengers (Ap. p. 1023), and there was

ample space for additional bunks, which were not required (Ap. p. 1024).

Testimony of these witnesses introduced by the petitioner sustains the findings of the Commissioner and the decision of his honor, Judge Dietrich. It is very apparent from a reading of the record in this case that these claims were asserted against the petitioner in accordance with the plan which was conceived on board the S. S. "Victoria" during her southbound voyage by a group of disgruntled miners from the Hammond Mine, Nome, Alaska, who were forced out of employment and their season's wages seriously curtailed by a strike, in which they participated, and probably precipitated. These men were fully aware of the accommodations afforded in the steerage quarters of the S. S. "Victoria" at the time they purchased their tickets and it was upon the representation that they could recoup their losses, at least to the extent of recovering back their passage money, that the ringleaders in this scheme induced a substantial number of their fellow miners and strikers to sign the agreement which subsequently resulted in this proceeding.

As well stated by Judge Dietrich, these passengers were not women and children, or inexperienced men. They were all experienced men and of a character and temper to vigorously assert their rights. As previously stated, five of the claimants were deserters from the petitioner's steamer "Oduna" at Nome; several were previous employees

in the steerage department of this vessel and one at least an employee on this particular voyage and one of them an admitted active participant in the gambling alleged to have been carried on on this voyage, and practically all of them strikers from the Hammond mine. They had traveled on this vessel repeatedly on previous voyages and knew what steerage accommodations and steerage food should be furnished them. As admitted by one of the claimants, their real complaint was that Orientals were placed in the steerage on the southbound voyage, but surely this does not constitute a breach of contract. They well knew that Orientals customarily traveled in the steerage and so far as the record shows, these Orientals disported themselves in a more orderly and cleanly manner than the claimants in this case. If these men had had any such grievance as some of them have testified to in this case, they would have vigorously asserted the same. The fact that during the entire voyage not a single complaint was made to an officer of this vessel is in itself very persuasive that the present claims are unfounded.

The carrier's duty to its passengers is well stated by his honor, Judge Hunt, in the "*Santa Clara*" case, 174 Fed. 913:

"When the appellees bought their tickets and boarded the ship, they had a right to reasonably clean and comfortable quarters and they had a right to expect that the ship's officers and employees would do all in their power to so furnish them."

The extent of the carrier's obligation in this respect is dependent upon the class of accommodations contracted for by the passengers. It was not to be expected that the accommodations in the steerage compartment should be of the same character, either as to ventilation or cleanliness, as accommodations in the first class.

As stated in the "*Sonora*" *supra*, certain discomforts are incident to an ocean voyage in second class or steerage quarters. With one hundred and ninety passengers occupying open space in close proximity to each other, it was unavoidable that there should be some discomfort from close air, etc. What would satisfy one passenger would not satisfy other passengers in the same quarters. These conditions are unavoidable.

It is very significant that not one single steerage passenger, either white or Oriental, signed this agreement aboard the "Victoria" or filed a claim against the Petitioner or joined in this proceeding, as a claimant, excepting this group of disgruntled miners who took passage at Nome.

Not a single first-class passenger joined in this proceeding or testified on behalf of Claimants, although the evidence stands uncontradicted that the same food (differing only in variety) was served to the first-class passengers as was served to the steerage passengers.

We respectfully submit that the decree of the

lower court dismissing the claims for breach of contract of carriage should be affirmed, and that the decree disallowing costs to the petitioner should be reversed.

CLAIM FOR PERSONAL INJURY AND DEATH OF JACK MILES.

Jack Miles was a steerage passenger on this voyage of the steamer "Victoria." He had been working as a carpenter for a mining company at Nome during the summer season, at wages of \$8.00 per day and board. The "Victoria" left Nome on August 22nd, and arrived at Akutan on August 24th, at which port she loaded 800 drums of whale oil, weighing approximately 1200 pounds per drum. In addition to the ship's crew a number of the steerage passengers were employed to assist in loading this whale oil, Claimant, Jack Miles, being one of the men so employed. These drums of whale oil were loaded in various parts of the ship, and while loading the same in No. 4 hold, Jack Miles claims to have been injured.

He testifies that these drums were lowered into the hold by the ship's winches, that five men besides himself were working in the hold and that it was their duty to roll these drums into the after part of the hold where they were supposed to be blocked up

and stowed by some member of the ship's crew. It was his claim that there was insufficient light in the after part of No. 4 hold; that he rolled one of the drums into the after part of said hold where it was dark, that he could not see the man who was supposed to block up the drum and without waiting to see whether the same was blocked up, or even that the said man was present in his position to take care of the drum, that he, Miles, turned around to walk back to the square of the hatch, and had taken only a few steps when the drum rolled back and crushed his heel.

“Q. How far back did you roll them from the place where they came down?”

“A. Well, I should judge it was over fifty feet, I don't know how much further it seemed like it was quite a ways back there. It was in the dark there. I could not see the place with the light they had and I do not know what it looks like back in there and there were three of us would roll it back and then go back to get another one. While I was trying to get away from there, I was walking away from there and one of the barrels rolled back and caught my foot.”

(Ap. p. 439).

“Q. After you got them aft how would you block them up?”

“A. They were not blocked up, they were rolled up there. I saw one blocked when it started to roll a little bit.”

“Q. Were you working blocking them up?”

“A. I was not supposed to pay any at-

tention to that part of it. I was supposed to go back and start another barrel on its way.”

“Q. All you were doing was rolling barrels back, and another man also was blocking them up?”

“A. Two of them went back and started to get them away from the hatch. Then that man would look after them back there and then he would come and help us roll it back.”

“Q. What did you put under them after you got them back there?”

“A. The deck was all we had to put under them.”

“Q. You had to set them on their end?”

“A. That is what they were supposed to do, but I didn't. After I got hurt, I didn't do much then.”

“Q. Before you got hurt were you helping roll them back and then upend them?”

“A. We upended three or four at first and then we rolled them over to the side of the ship because they would not stay up on end. There was not room enough to set them up on end.”

“Q. Were you just rolling them there and leaving them there on the sides?”

“A. Left them there for this fellow to look after them” (Ap. pp. 452-453).

“Q. * * * After you had rolled this barrel back to him, do I understand you turned around and then the barrel rolled and hit you?”

“A. I started to walk back toward the hatch and the barrel we had just previously rolled there from the hatch rolled back and hit me.”
Upon this evidence Judge Dietrich held:

“The evidence upon this claim is extremely meagre and would be doubtful sufficient to go to a jury in an ordinary action for personal injury. But if negligence there was it was the negligence of a fellow servant.”

We submit that upon the merits of the claim there was no evidence to establish negligence on the part of the Petitioner. According to the Claimant's testimony, he rolled this heavy drum back into the after part of the ship where it was so dark that he could not see, and without upending the drum or blocking it off to keep it from rolling, or without waiting to deliver the drum to the man whose duty it was to stow the same, he turned around and had taken a few steps when the drum rolled back and struck his heel. There were six men engaged in this work, three in each gang. The member of the crew in the after part of the ship in charge of the stowage was supposed to block off the drums to keep them from rolling. Whether he was engaged in blocking off a drum which had been rolled back by the other gang or was even present in the after part of the ship at the time the Claimant, Miles, rolled this particular drum into the after part of the ship does not appear from the evidence. Certainly it was Miles' duty to retain possession of the drum until he had safely delivered the same to the man whose duty it was to stow said drum. Miles does not claim that he performed this duty or that he took any precaution whatsoever to see that this heavy drum was safe before he released it. On the

contrary his testimony is that he rolled it into the after part of the ship where it was dark, immediately turned around and had only taken a few steps when the drum rolled back and struck him. Certainly there is no evidence of Petitioner's negligence.

On the question of light, the First Officer testified that there were ample lights in use, that no complaint was made to him as to the necessity for additional lights, that there was an extra supply of lights aboard and that additional lights could have been furnished if required (Ap. p. 717). Claimant Miles makes no contention that any promise was made to furnish additional lights. He had been engaged in this work for seven hours and if in fact it was true that the insufficiency of light was the cause of the accident that condition was known to the Claimant and the risk incident thereto was assumed by him.

After completion of this work at Akutan, Miles was paid off and signed the Longshoremen's payroll which contained the following release:

"In consideration of receiving the amount stated below from the Alaska Steamship Co. I hereby release and discharge the Alaska Steamship Co. from all claims, demands and causes of action whatsoever from the beginning of the world to this date." (Petitioner's Exhibit 3, being copy of original payroll.)

This accident having occurred on August 25th, no complaint was made by the Claimant until the

following morning, when he went to the Stewardess, who bathed his foot in a solution of salts. No further treatment was requested or given. On August 26th the vessel arrived at False Pass and loaded some 29,000 cases of canned salmon. Claimant, Miles, not only did not make any complaint to any of the ship's officers as to his alleged injury but on the contrary he solicited the First Officer for employment at False Pass, and together with other steerage passengers was employed to assist in loading this canned salmon. He worked for eighteen and one-half hours at False Pass, receiving \$18.50.

“Q. What character of work was he doing?”

“A. Loading salmon.”

“Q. What particular work was he doing in connection with loading salmon?”

“A. Piling and carrying when I saw him.”

“Q. Carrying cases and piling them.”

“A. Yes sir.”

“Q. Had he made any complaint to you prior to performing this work at False Pass with reference to being injured?”

“A. No sir.”

(Testimony, First Officer, Ap. p. 716.)

Miles made no complaint to the ship's officers with reference to his alleged injury until two days after the vessel had left False Pass (Ap. p. 718). The vessel arrived at Seward on August 28th and

remained there for 24 hours. Claimant did not go to a doctor at this port and on August 30th the vessel called at Latouche and remained there for 12 hours, but the Claimant did not consult a doctor at this port. After arriving at Seattle on September 4th the Claimant, Miles, joined with other steerage passengers in making demand for \$250.00 damages for breach of contract of carriage, but did not at said time make any demand for his alleged personal injury. On September 25th, three weeks after the vessel arrived in Seattle, Claimant, Miles, called upon the Superintendent of the Petitioner and was given an order for medical treatment at the Virginia Mason Hospital. He testified that he was given treatment first by Dr. Dowling and afterward by Dr. Lyle of said hospital. Dr. Dowling was produced as a witness on behalf of the Claimant and testified:

“Q. Will you tell the Court the nature of the injury you found?”

“A. It was a fracture of the fifth left metatarsal bone.”

“Q. Was there any straining or tearing of the ligaments of the ankle on the left foot?”

“A. There was nothing apparent.”

* * * * *

“Q. Had the bone ever been set before he came to you, as you recollect?”

“A. It was not out of place when I examined it.”

“Q. What did you do?”

“A. I dressed it for him.”

“Q. And have you ever examined him since that time?”

“A. Not that I remember” (Ap. p. 592).

“Q. And the use of the foot with that bone rubbing against the side of the shoe would naturally cause pain and prevent any form of healing until it was set in the proper way and at the proper time, would it not?”

“A. We usually consider that the wearing of the shoes is all that is required for a fracture like that.”

“Q. No use to go and see a doctor at all?”

“A. Not a bit.”

“Q. Was not any necessity for having the bone set?”

“A. There was no necessity for the bone was not out of place” (Ap. p. 594).

The doctor further testified that the fifth metatarsal bone is not a very important bone in the foot (Ap. p. 593), and on cross examination:

“Q. What result would you expect from the fracture of that kind if you had given it a treatment?”

“A. Such a fracture should result in the complete cure.”

* * * * *

“Q. Within what length of time should it be a complete healing?”

“A. This disability is ordinarily considered to be about three or four weeks” (Ap. p. 595).

No other medical testimony was offered.

During the progress of this case Jack Miles suddenly died in Tacoma on October 17, 1925, and his widow was substituted as a Claimant and filed an additional claim for \$10,000.00 upon the ground that the death of said Claimant had resulted from the conditions complained of on board the "Victoria," that is, the close quarters and food. Like most of the contentions in this case this claim was without any foundation whatsoever. Dr. Perry, Coroner of Pierce County, held an autopsy upon the Claimant, Miles, and found that he had died directly from a cerebral hemorrhage. Dr. Perry found that Miles' vital organs were all in perfect condition, excepting that he was suffering from sclerosis and hardening of the arteries which were the secondary causes of his death (Ap. pp. 1075-1076). There was no connection whatsoever between this man's injury or the living conditions on the steamship "Victoria" and his subsequent death.

It appears that following Mr. Miles' return to Seattle after completion of the voyage of the "Victoria" he did in fact resume his occupation as an interior decorator and painter, working at the Winthrop Hotel in Tacoma and the Donnelly Hotel in Tacoma.

The present administratrix of the estate of Jack Miles was married to him on March 15, 1925, something over six months after he claims to have sustained this minor injury to his foot on the "Victoria" (Ap. p. 1063).

We respectfully submit that the evidence entirely fails to show any actionable negligence on the part of the Petitioner in connection with the slight injury to the Claimant's foot. At most the injury complained of was of a minor nature with a disability at the outside not exceeding three to four weeks. There was no showing that Claimant lost any earnings during this period of disability. He had been working as a carpenter in the mines at Nome and upon his return to Seattle he had no regular employment, nor is there any showing that he could have obtained employment. We think this claim entirely fails both from lack of proof of actionable negligence and from lack of proof of any damage.

The Commissioner, finding against the Claimants on every issue presented in these proceedings and recommending as a Conclusion of Law that the claims, and each of them, be dismissed, further recommended that each side stand its own costs. The Lower Court in affirming the Findings and Conclusions of the Commissioner entered a decree disallowing costs to the Petitioner. It is a settled rule in admiralty that costs will follow the decree except in exceptional cases where in the discretion of the trial Court costs may be disallowed. The rule is stated in *Benedict on Admiralty*, 5th Ed., Sec. 435, as follows:

“Costs are always in the discretion of the Court. This discretion, however, is a judicial discretion and though an appeal will not lie on

a question of costs alone, an Appellate Court, in passing on the merits, will upon proper assignment of error, correct an abuse of discretion or a departure from settled principle in the disposition of costs. Costs generally follow the decree, but circumstances of equity, of hardship, of oppression or of negligence induce the Court to depart from that rule in a great variety of cases."

In the case at bar these Claimants asserting a demand, which has been found to be entirely without justification, both by the Commissioner and his Hon. Judge Dietrich, commenced thirty separate actions in the State Court and were threatening twelve additional actions in said court. To avoid this great multiplicity of suits and the great cost incident thereto, and to protect the Petitioner against possible judgments far in excess of the appraised value of the vessel and her pending freight, the Petitioner was forced to commence this proceeding at very considerable cost. A very large portion of the cost incident to the commencement of the Limitation Proceedings amounting to close to \$1000.00 will have to be borne by the Petitioner in any event. To disallow taxable costs incurred by the Petitioner in a suit of this character where there are no equities in favor of the Claimants would be merely to encourage the commencement of these unfounded suits. This matter being before this Court, in Admiralty, as a trial *de novo*, it has full power in its discretion to correct any errors in the decree below even though the Petitioner herein did

not take a cross appeal. This rule is so well settled as to not require any citation of authority.

We respectfully submit that the decree of the Lower Court should be affirmed in all respects excepting that the Petitioner's taxable costs in the Lower Court and in this Court should be allowed.

Respectfully submitted,

LAWRENCE BOGLE,

CASSIUS E. GATES,

Proctors for Appellee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

3

No. 5050

In the Matter of the Petition of the ALASKA STEAMSHIP COMPANY, a corporation, owner of the Steamship "Victoria," an American vessel, for Limitation of Liability,

Petitioner and Appellee,

C. L. ANDERSON and Forty-two Others,

Claimants and Appellants.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HON. FRANK S. DIETRICH and HON. JEREMIAH NETERER, *Judges*

Reply Brief of Claimants and Appellants

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FILED

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F. D. WASHINGTON



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Reply Brief of Claimants and Appellants

The brief of appellee is misleading in many respects. The findings of the Commissioner are likewise misleading in many respects and on matters entirely apart from the issues in this case. The Commissioner makes the finding:

“That each of the claimants had made the voyage north from Seattle to Nome in the steerage of the Victoria in the spring of the year

1924, and that there were a greater number of passengers in the steerage at that time than on the return trip in August, 1924. Further, that a number of the claimants had made trips to Alaska and return, in the steerage of the Victoria, for many years.”

The Commissioner, after making a finding on the conditions aboard this vessel and the number of passengers carried in the spring of 1924 (which voyage had nothing whatever to do with this case), neglects, however, to find that on this particular voyage in the spring of 1924 that the white passengers were carried alone and were not berthed in with a lot of coolie Chinese cannery men in the steerage. He likewise fails to make a finding that the whole of the steerage was in the spring voyage devoted to passenger accommodations and that half of the largest part of the steerage was not devoted to and filled up with freight, as it was on this voyage.

The Commission also makes the finding:

“The claimants made the voyage to Alaska for the purpose of prospecting as miners or as wage earners; a number of them being under contract to work for the Hammond Mining Company, located at Nome.

“Due to a strike of employees of the Hammond Mining Company participated in by some of the claimants and other of the claimants affected by the closing down of operations of the company, returned to Seattle on the Victoria on the voyage in question.”

Clearly, these findings are entirely outside of the question whether or not the passengers' contract was broken on the voyage in question, but are thrown in as a slur in accordance with the ideas of proctor for appellee—that prospectors, miners and wage earners were likewise strikers and for that reason not entitled to much consideration. These findings follow strictly the argument of proctor for appellee before the Commissioner and are practically copied therefrom. The evidence shows that but few of the claimants had been employed by the Hammond Mining Company, but were engaged on their own behalf in a venture of bettering their condition and developing the country.

ARGUMENT

The Commissioner made five findings, the first finding is,

“The Victoria was staunch, properly manned, equipped and victualed for the voyage in question.”

The second finding was:

“The food of the first class passengers, officers, crew and steerage was of the same quality (with the exception that the coffee of the crew and steerage was of a lesser grade), and cooked at the same time and in the same vessels.”

On these two findings the evidence is in direct conflict.

The third finding is:

“Owing to the limited capacity of the dining room, it was not possible to seat all the steerage passengers at one time, and several seatings had to be made.”

This finding is true.

The fourth finding of the Commissioner, which we wish to emphasize, was:

“It was a matter for the passengers to decide who was served first or otherwise.”

I.

THE FINDING THAT “IT WAS A MATTER FOR THE PASSENGERS TO DECIDE WHO WAS SERVED FIRST OR OTHERWISE” IS CLEARLY ERRONEOUS.

According to Mr. Crosby, the steerage steward’s testimony on direct examination on behalf of the petitioner, the order and manner of seating the passengers was decided by the passengers who “had more force to push their way through and get to the table; fight their way to the table.” This is the petitioner’s own evidence and from its main witness and officer in charge of that department and is likewise corroborated by every other one of the witnesses and is not contradicted by any. We submit that there is but one conclusion that can be reached from this evidence by this court and that is, that the petitioner violated its

duty towards the passengers by not providing some orderly method of seating the passengers at the tables, and in guiding and controlling their conduct with reference to each other. It is the duty of the petitioner as much to see that one passenger is not harmed or trampled upon by another as to protect the passengers from any other source of injury, discomfort or annoyance. In this respect the petitioner clearly violated its duty and in so doing breached its contract with every one of the claimants.

The finding that it was a matter for the passengers to decide who was "served first or otherwise" on the vessel is perhaps about the most ridiculous proposition ever advanced by the owner of a steamship with the hope of having such a proposition accepted by any court and thereby relieve the steamship company from responsibility. Mr. H. S. Crosby, the steerage steward, testified at page 325 of the Commissioner's typewritten transcript of evidence as follows:

(MR. BOGLE) "Q. Now, in serving the meals were there any confusion about the men getting to the table? A. Certainly. We had about 189 people aboard the ship and who ever got there first was first served. There was confusion there about that because when the tables were set the bell was rung and there was always a rush for the seats at the table. Q. I will ask you, Mr. Crosby, whether or not the Orientals were always

served first? A. No. I could not say. Whoever got to the first table got the first meal. Q. Was or was not it the fact that the Orientals were always there at the first meal? A. No, there were a whole lot more whites ate at the first table than the Orientals, because they had more force to push their way through and get to the table, fight their way to the table."

It is respectfully submitted that on this finding of the Commissioner and evidence of the petitioner which stands uncontradicted that the appellants are each entitled to recover.

II.

THE CLAIM OF APPELLANTS THAT THEIR CONTRACTS WERE VIOLATED BY THE PETITIONER IN PERMITTING AND FURNISHING LIGHTS TO ENABLE GAMBLING TO BE CARRIED ON THROUGHOUT THE DAY AND NIGHT IS CONCLUSIVELY ESTABLISHED.

The petitioner likewise violated each of the contracts of the claimants in permitting and carrying on gambling and converting the steerage quarters into a gambling den and by furnishing and installing large candle power lights to aid in the conducting of the gambling and in furnishing the lights therefor throughout the night. The Commissioner failed to make any finding whatever as to the gambling and the converting of the entire dining quarters of the

steerage into a gambling den and using the same night and day throughout the voyage by professional gamblers, conducting a regular gambling house, and the only finding in the case by either the Commissioner or by the Hon. Frank S. Dietrick, Judge, in approving the findings, is that made by Judge Dietrick when he says in his memorandum opinion the following:

“Doubtless, there was some gambling in the card games, but here, too, it is thought claimants have greatly exaggerated the effect upon their comfort.”

The appellee's proctor in the lower court sought to make light of the effects of gambling conducted upon this vessel and voyage and to laugh the same away and that by so doing misled Judge Dietrick into the belief that the claimants “greatly exaggerated the effect upon their comfort,” and to believe that card games were carried on for pleasure and that some gambling crept into the card games that were carried on, while the games actually conducted were all crooked gambling games of the most vicious type, black jack, stud poker, etc., all for large sums of money. Here again the evidence stands wholly uncontradicted.

1st. That the officers of the ship installed large candle power lights in the steerage eating quarters for the purpose of enabling the professional gamblers to conduct gambling throughout the night every night.

2nd. It is uncontradicted that the vessel, through its officers, furnished the electric lights throughout the night to enable the gambling to be conducted.

Had the master desired to stop the gambling all he would have had to do was to order the lights turned off in the gambling quarters. That would have stopped the gambling at night and the port holes could then have been left open, giving some ventilation in the steerage sleeping quarters. This they did not do, and there can only be one reason for failure so to do, and that is that the officers of the ship or the petitioner were participating in the profits from the gambling being conducted. The evidence shows and it is uncontradicted that this same Frank Ryan conducted gambling on the voyage 139 and voyage 140, which is the voyage in question, and on the next voyage, 141, also, traveling up and down on this ship as the head gambler on the vessel. The captain's own testimony is, "Well, I was told by a lawyer that nobody could stop it at sea, but at the same time I went up there every day and I would tell those fellows, 'Keep your money in your pockets, don't come to me a bellyaching about your damn money'." (Commissioner's copy of typewritten transcript, page 315.)

And at page 317 testified:

“Q. Who is this Frank Ryan? A. He used to be steerage steward on there for years and years and he was the best man that ever they had and he was fired on account of the gambling. I suppose if I stayed up all night every night and would stand by there I could stop it.”

It was not necessary for the captain to stay up all night. All he had to do was to order the electric lights turned off. It was his duty to have done so. That would have stopped the gambling. Certainly the ship could have refused to install extra large electric lights to be used for the gambling and could have refused to furnish the light throughout the night. That would have been a very simple way of stopping the gambling. There is no excuse for it, except that they participated in the profits. The captain further testifies:

“Q. He (Frank Ryan) was a professional gambler? A. That is what he is. Q. And comes down in the fall on this boat? A. Yes. Q. Is it not a fact that he travels up and down on the two last trips in the fall? A. That is what they say.”

The gamblers were further protected by the officers of the ship by permitting them to close up the port holes, the only source of ventilation into the after steerage sleeping quarters, so as to make it more comfortable for the gamblers to carry on their games in the dining quarters, which were directly above the

sleeping quarters. This rendered the conditions below indescribably bad and there isn't any question whatever about it, and that the claimants did not exaggerate in the least respect as to the conditions existing in their quarters at night. In fact it was impossible to fully describe them as bad as they were. Further, the company in permitting this gambling to be carried on by professional gamblers and the crew resulted in getting a crew consisting of gamblers, ex-convicts and prize fighters, and that is the class of help that they had on this voyage. Of course, they would swear to anything suggested by the petitioner to aid the company and that is the class of testimony sought to be weighed against the testimony of the claimants, all of whom were honest, hard working men who went into the north to prospect and better their conditions and to develop the country. We submit that this court must find on the admitted evidence of gambling that the contracts of each of the claimants were broken, and that the petitioner flagrantly violated its duty towards the passengers in looking after their care and comfort, by permitting the claimants' quarters to be used for the purpose of gambling as it was on this voyage.

It is respectfully submitted that no other finding can be made on the evidence. It is a serious matter

and damages should be allowed in favor of the claimants, not only to compensate them for the injuries and discomforts sustained, but to penalize the company for permitting such a course of conduct to be carried on in violation of law upon this vessel. The petitioner should not be permitted to allow a crime to be committed upon its vessels and gambling is made a crime in every state in the Union and in the Territory of Alaska as well. Nor should this court permit a crime of this kind to go unnoticed and to be laughed at as the proctor for appellee did in the lower court and by so doing misled the lower court into the error that there was only "some gambling in the card games."

III.

THE BERTHING OF A LOT OF CHINESE COOLIE CANNERY WORKERS IN THE SLEEPING QUARTERS WITH THE STEERAGE PASSENGERS AND INTERMINGLING THEM SHOULD OF ITSELF CONSTITUTE A BREACH OF THE WHITE PASSENGERS' CONTRACT.

It is the first time that the steerage white passengers were ever subjected to such humiliation. Heretofore only white passengers were carried in the steerage on this vessel and this was the first time that it

had happened. It is also clear that the claimants had no knowledge that such was to be the case, on this voyage. They were told by the agent at Nome that the sleeping quarters were large and airy and would not be crowded on the voyage going down. This is undisputed. Conditions which might be put up with by coolie Chinese laborers of the lowest type should not be the measure of the petitioner's duty toward the white passengers.

It is respectfully submitted that the mixing and pouring in of coolie Chinese cannery workers upon the white steerage passengers was a violation of the conditions of the contract of carriage which the company made with these claimants. It was a thing that had never been done before, as shown by the evidence, and the court should allow substantial damages against the petitioner for doing so, and not require white men to fight with a lot of Chinese coolie laborers to get a seat at a table to be served with sufficient food to keep them alive on the voyage.

IV.

THE STORAGE AND CARRYING OF FREIGHT IN THE
QUARTERS SET ASIDE FOR THE STEERAGE PAS-
SENGERS OF ITSELF CONSTITUTED A BREACH OF
THEIR CONTRACT.

The small map, claimants' "Exhibit A-22," shows Hold No. 2, being the after steerage sleeping quarters, and that practically one-half of this, the larger part of the steerage quarters, was used for the purpose of carrying freight. The appellee in its brief says of this:

"The fact is that 1200 cases of canned salmon was stowed against the after bulkhead to give the ship a proper trim (Ap. p. 1026)."

The fact is there was over 10,000 cases of salmon carried in the steerage sleeping quarters. Of this the captain says:

(MR. BOGLE) "Q. Now do you know why the salmon was loaded in the after part of No. 2 between-decks? A. Because she was going by the head and I put that in aft between the bulkhead of No. 2 where it was not in anybody's way."

(Page 315 Com. Typewritten Testimony.)

The excuse that the captain endeavors to give for carrying this large amount of salmon in the steerage quarters is that the vessel "was going by the head." The court will observe from the blue prints that where the salmon was placed in the after part of the steerage sleeping quarters it was still a considerable distance forward of amidship and the placing of any weight in the steerage quarters would put the vessel down by the head more than she was. John Paone, who had charge of the storing away of the

salmon in the steerage quarters, testified at pages 592 and 593 of the Commissioner's Typewritten copy of the Transcript as follows:

"I would estimate that there were 9 to 10 thousand cases of salmon in that hold as we finished loading No. 2. I helped stow the cargo taken at Akutan and False Pass. It was stored in tiers, one on top of each other. The tiers were from five to seven cases high. That is as near as you can put it to the top and allow space for the pipes running back.

"Q. 'And how as from side to side of the ship?'

"A. From both ends, from both sides, as I remember, up to the hatch coaming; I do not say directly underneath the hatch. But I was one of the men that moved at least two sets of berths or standees, to make room near the hatch in order to get the salmon in. I asked the chief officer where he was going to put the rest and he said: 'Move the berths.'

"I do not know how many were moved, but I know I at least moved two myself. I don't know how many men of the crew were helping. I should judge around eight or ten men. (593.) The salmon was carried from False Pass to Seattle. This Hold No. 2 between-decks was the same deck that the steerage was on, the same compartment where the steerage was berthed."

The witness further testified on pages 605 and 606 of the Commissioner's typewritten copy of transcript:

"That the expression 'going by the head' as used by seafaring men means that the bow is

down too far to have an even balance. The captain had testified that salmon was loaded in the aft part of No. 2 between-decks because the vessel was 'going by the head.'

"The 'Victoria' is about 361 feet, I believe, and 41.1 width. (605.) 19 feet deep, gross tonnage 3,502, net 2,112. The aft part of hold No. 2 between-decks, which is set aside for steerage sleeping quarters, is forward of amidships, so that putting a load of salmon in the aft part of hold No. 2 between-decks would put her down more forward."

The reason given by Captain Davis for placing this large amount of salmon in the steerage quarters is self-evidently false, because the salmon was forward of amidships and would put the vessel down by the head more than she was before. It is simply another trumped-up excuse to avoid liability for another breach of the passengers' contract.

V.

CLAIM FOR PERSONAL INJURY AND DEATH OF JACK MILES.

The 9th finding of the Commissioner as to the injuries sustained by the claimant, Jack Miles, is as follows:

"I find from the testimony that during the voyage the claimant Jack Miles was employed by the officers of the vessel to assist in stowing certain cargo taken on at way ports. That during the process of stowing certain barrels in one of

the after-holds, Miles with two other men similarly employed, rolled one of the barrels to its proper place, leaving it for another man to block in position; that he turned and walked toward the opening of the hatch to help care for other cargo coming in; that the barrel which he had just left rolled and struck his left heel, breaking the outer bone of the left foot. Miles also testified that the hold in which he was employed as stevedore, was not properly lighted; that this fact contributed to his injury. It also appears from the testimony that the person to whom Miles delivered the barrel which caused the injury, did not properly block the barrel in position which was a part of his duty."

The 3rd conclusion of law made by the Commissioner was:

"As to the claim of Jack Miles for personal injury and the claim of the administratrix of the estate of Jack Miles, deceased, I recommend that said claims be dismissed for the reason that any injury suffered by said Jack Miles was due to the negligence of a fellow-servant."

This finding and conclusion seemed quite agreeable to the lower court and the appellee as being sufficient to deprive the claimant, Jack Miles, of any right of recovery for personal injuries. It was under the old decisions. But under Sec. 33 of the Merchant Marine Act, approved June 5th, 1920, it was not. But under this section and the decision of the United States Supreme Court in the case of the *International Stevedoring Company, petitioner vs. R. Haverty*, 71

L. Ed. 22, the findings of fact of the Commissioner, approved by the lower court, entitled the claimant to recover. It is true that the testimony as to the injuries of the claimant is not voluminous, but it is clear and stands wholly uncontradicted and is corroborated by the testimony of F. E. Baker, the first officer, and the only other evidence in the case. Mr. Miles testified:

“They had 800 barrels of whale oil to load, that is what he said, and it was about 8 o’clock in the evening. We were working No. 4 hatch, finishing up, and they were shoving it down there to us so that we could hardly get it out of the way and they were hurrying. They didn’t have any lights back in the place where we were putting them and there was one fellow letting them down in the hull with the machinery, and there is what they call the house that the shaft goes back through the shaft-house, and there were three of us there working together handling the barrels, rolling them back to this man. I should judge it was over 50 feet that we rolled them from the place where they came down. It was in the dark there. I could not see the place with the light they had. There were three of us would roll it back and then go back to get another one. While I was trying to get away from there, I was walking away from there and one of the barrels rolled back and caught my foot. Fireman Williams was in charge over us. He was employed by the ship and there were some sailors working with us.” (Pages 18 and 19 of Commissioner’s record.)

And on pages 32 and 33 testified:

“I was hurt while they were working No. 4 hatch. I was working in the aft hatch in the lowest hold. I was rolling the barrels aft. They were not blocked up back there, I saw one blocked when it started to roll a little bit. I was not supposed to pay any attention to blocking. I was supposed to go back and start another barrel on its way. Two of the men went back and started to get the barrels away from the hatch. Then that man would look after them back there and then he would come and help us roll it back. (32,) We up-ended three or four at first, and then we rolled them over to the side of the ship, because they would not stay up on end; there was not room enough to set them up on end. We left them there for this fellow to look after them. I could not see in there as to how he was looking after them.”

Mr. F. E. Baker, the first mate, testified at page 298 of the Commissioner’s record:

“That at Akutan Miles was working in the hold of the vessel where the lights were out; that they burned a fuse out.”

As to his injuries, Mr. Miles testified that he complained about his injuries to those in charge of loading; that he was hurt and wanted to know if there was any way of getting off and they told him “No.” He further testified as follows:

“After I got out of the hold I went up to the purser’s office and told him I was hurt. I asked for treatment and he says, ‘The next fel-

low.' He did not answer me at all. I went down below then, and I suffered so that night, I complained to the fellows down there. I could not get out of there. I complained to the steward in the steerage department and he said there was no doctor aboard."

Miss Janette Warren, the stewardess and a graduate nurse, testified: "That Mr. Mile's foot was swollen pretty bad when she first saw it." (Page 418 Commissioner's record.) That they did not have a hospital room on the boat and that they did not carry a physician; that she was not on the Victoria in the year 1918 when 52 people died on that boat with the Flu.

The law requires a ship of this character to provide a hospital room for those that may be injured upon the vessel. (Sec. 8002, Comp. St.) Even the freight vessels with a crew of 12 or more, which does not even carry passengers, is required to carry medicine and have a hospital room where the injured or sick may be placed and treated. It is well settled in Admiralty that where a member of the crew is injured on a vessel and is not given the proper care and treatment that the company is liable for all of the resultant effects and permanency of the injury.

That the bones of Mr. Miles' foot did not unite, because the foot was not put in a cast and held rigid,

but by movements of the foot the bones grated and never did unite on that account.

It is next contended by appellees in their brief that Jack Miles signed a pay roll for the money which he earned at the time he was injured for his wages and that on this pay roll there was a provision printed to the effect that upon signing the same he released and discharged the company from all claims and demands and causes of action whatsoever from the beginning of the world up to date. Petitioner's "Exhibit 3." This is the first time that that contention was ever brought to the notice of a court. There was no release on discharge pleaded in the lower court nor ever mentioned in any of the arguments in any court until the same appeared in the brief of the appellee for the first time in this court—notwithstanding that the rules provide that the petitioner in a limitation of liability proceedings must set forth the facts in his petition by reason of which he claims an exemption from liability. This was not done in this case and no contract of release or discharge was ever made by the decedent, Jack Miles.

It is respectfully submitted that the widow of the decedent, Jack Miles, is entitled to recover damages for the injuries, pain and suffering which he received,

and also for the loss of earnings and for the causing of his death which is established from this evidence and was caused and resulted from the treatment he received on this boat. He was a well man and in good health when he went aboard the boat and his health was destroyed on this trip. He was a sick man when he came off the boat and never recovered and the testimony shows what caused his sickness and the destruction of his health, and damages should be awarded accordingly.

VI.

SECTIONS OF THE UNITED STATES COMPILED STATUTES 7997-98-99, 8000, 8001-2-3 OF THE TRANSPORTATION OF PASSENGERS AND MERCHANDISE ACT ARE APPLICABLE TO THIS CASE, AND WILL BE MADE SO BY ANALOGY AS BEING THE EXPRESSION OF CONGRESS ON THE REQUIREMENTS OF SHIPOWNERS IN THE TRANSPORTATION OF PASSENGERS.

Appellee has studiously avoided reference to any of the salutary provisions of the "Transportation of Passengers and Merchandise Act," being Chapter 6, Page 8514 of the U. S. Compiled Statutes, Annotated. Section 7997 provides for the accommodations of steerage passengers; Section 7999, for the berthing of steerage passengers; Sec. 8000 provides for light and air for passengers, ventilators, hatchways, companion-

ways, and water closets; Sec. 8001, food, tables and seats. Subdivision 5 of Section 8001, Compiled Statutes, provides:

“(5) Tables and seats.

Tables and seats shall be provided for the use of passengers at regular meals. And for every willful violation of any of the provisions of this section the master of the vessel shall be deemed guilty of a misdemeanor, and shall be fined not more than five hundred dollars, and be imprisoned for a term not exceeding six months.”

Section 8002 provides for hospital compartments, surgeon, medicine; Sec. 8003, maintenance of discipline and cleanliness.

There is every reason in the world for holding this vessel to a strict compliance with these statutory provisions. They were the expressions of Congress made necessary from experience for the protection, care and comfort of passengers traveling at sea. This old vessel was built in 1870; the steerage sleeping compartment in which these passengers were carried was built into the vessel as a freight compartment, and has so remained ever since, and the fact, which the appellee makes much of, that the vessel has been run on this route in the same manner without changes made necessary by later statutes being made, is no excuse for its violation of the contracts of these claimants on this voyage.

These statutes even though the title of the Act does not make them by word applicable from Nome, Alaska, to Seattle, the court will by analogy make them applicable, as the voyages referred to in the statutes are practically the same length, and the conditions and requirements of the passengers are practically the same. This court in the case of *The J. D. Peters*, 78 Fed. 368, at Page 377, makes Section 4569 of the Revised Statutes, which applied to a voyage across the Pacific, applicable to a voyage from Port Townsend, Washington, to Port Clarence, Alaska, and says:

“Section 4569 of the Revised Statutes applies to every sailing vessel bound on a voyage across the Pacific Ocean, etc. It is claimed by proctor for respondents that this law is inapplicable to the present case, because the vessel did not sail across the Pacific Ocean in making a voyage from Port Townsend to Port Clarence, Alaska. This is controverted by proctor for libelants, who claims that, to all intents and purposes, the bark *J. D. Peters* crossed the Pacific Ocean when she traveled from Port Townsend, Wash., to Port Clarence, Alaska, owing to the gradual and regular contraction of the parallels of longitude as these approach the North Pole. But, irrespective of whether the statute in question is applicable to the voyage in this case, I should apply, by analogy, the rule of 10 per cent., contained in the statute, as being a just and equitable rule to follow.”

It is not even contended by appellee that it made any pretense at complying with any of the statutory

provisions, but makes much of the fact that the vessel has been run on this route for a number of years in the same manner it was on this voyage, but does not mention the fact that in 1918, fifty-two of the passengers lost their lives from Spanish influenza contracted in and from being confined in these same steerage quarters.

It is respectfully submitted that the petitioner by failing to comply with any of the statutory provisions clearly committed a breach of its contract with each of the claimants, and should be assessed with damages especially in a limitation of liability proceeding of this kind where the payment is to be paid out of the fund turned into court.

VII

IT IS NEXT CONTENDED BY APPELLEE THAT THE COMMISSIONER COMMITTED ERROR AND THE LOWER COURT COMMITTED ERROR LIKEWISE IN HOLDING THAT EACH SIDE STAND ITS OWN COSTS.

It is well settled that in limitation of liability proceedings the petitioner "must pay the preliminary expenses as such expenses are incurred by him for the purpose of availing himself of the benefit of the limitation statutes and are not taxable against claimants even though the latter are defeated."

In all cases the expenses of administration are paid out of the fund on the principle that the fund should administer itself. When the petitioner is successful and the fund is returned to him this constitutes payment of the costs by the successful party, but the reason is, of course, the same as in the case of preliminary expenses, i. e., that the payments were for the petitioner's benefit. Benedict's Admiralty 4th Edition, 383.

In the case of *Boston Marine Insurance Company vs. Metropolitan Redwood L. Co.*, 197 F. R. 703, at page 714, the court announces the rule as follows:

“Nor do we find that the court erred in ordering that the cost of issuing and publishing the monition be paid out of the fund. All that the petitioner in such a case is required to pay is the expense incurred in availing himself of the act of Congress, the cost of filing the petition and stipulation for costs and value, and the expense of appraisal, etc. In the *W. A. Sherman*, 167 Fed. 986, 93 C.C.A. 228, the Circuit Court of Appeals for the Second Circuit said:

“‘The cost of bringing in the creditors, such as filing, issuing, and publishing the monition, should be paid out of the fund, on the principle that it should administer itself, and this duty to administer itself applies even when, the petitioner being held not liable, there is no other distribution than to return it to him.’”

Besides costs in Admiralty always lie in the discretion of the court. The lower court did not commit error in the taxing of the costs.

It is respectfully submitted:

1st. That the petitioner clearly violated the implied conditions of its contract of carriage of each of the claimants by turning their quarters into a gambling den and permitting gambling to be conducted night and day throughout the voyage, and should be held to strict account for such conduct. Even on land the owner of a premises in which gambling is permitted is liable in damages for the losses sustained by any person participating in the game, and here the claimants, while at sea, had no voice whatever in the matter. They were under the control, command and direction of the officers of the ship who had full power and authority to subject the passengers to punishment for disobedience to their commands.

2nd. That the petitioner broke its contract with the claimants by not maintaining discipline upon the boat and by not controlling the conduct of the Chinese fishermen towards the white passengers and in permitting the stronger passengers who had more force to seat themselves first at the table by "fighting their way to the table."

3rd. The court committed error in not finding that the contracts of each of the claimants was

broken by the petitioner by their intermingling and berthing a large number of coolie Chinese cannery men in with the white passengers.

4th. The lower court committed error in not finding that the contract of the claimants was broken by the petitioner by storing and carrying a large amount of freight in the steerage quarters, the quarters which were set aside for the steerage passengers and on which the certificate of inspection was issued.

5th. The lower court also committed error in not finding that the steerage sleeping quarters were kept and allowed to remain in a dirty, unclean condition and in not providing more than one person to look after the entire steerage sleeping quarters and that person simply a "work-away" under no obligation to do anything and who did not do anything toward keeping the quarters clean, and that the claimants were not given the treatment and accommodations that they were entitled to under their tickets.

6th. That the claimant, Mrs. Jack Miles, is entitled to recover damages for the injuries sustained by Jack Miles and for his death in addition to her right of recovery for breach of the contract of his ticket.

7th. That substantial damages should be allowed to each of the claimants in this case.

WM. MARTIN,
*Proctor for Claimants
and Appellants.*

United States
Circuit Court of Appeals

For the Ninth Circuit.

CLAUDE REES, CHARLES F. HINE, REES BLOW PIPE
MANUFACTURING COMPANY, INC., a Corporation, and
PROGRESSIVE EVAPORATOR COMPANY, INC., a Cor-
poration,

Appellants,

vs.

NORMAN LOMBARD, MONTGOMERY FLYNN, WILLIAM T.
ECKHOFF, NORMAN LOMBARD and ELLEN LOMBARD,
Trustees for ELLEN LOMBARD, ELIZABETH LOMBARD
and NORMAN LOMBARD, Junior,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United
States District Court for the Northern District
of California, Third Division.



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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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Attorneys for Defendants and Appellants.

In the District Court of the United States, in and
for the Northern District of California, Third
Division.

No. 1089.

NORMAN LOMBARD, MONTGOMERY FLYNN,
WM. T. ECKHOFF, HORMAN LOMBARD
and ELLEN LOMBARD, Trustees for
ELLEN LOMBARD, ELIZABETH LOM-
BARD and NORMAN LOMBARD, Junior,
Plaintiffs,

vs.

CLAUDE REES, CHARLES F. HINE, M. A.
NEAL, REES BLOW PIPE MANUFAC-
TURING COMPANY, INC., a Corporation,
PROGRESSIVE EVAPORATOR COM-
PANY, INC., EDWARD B. WARD and
MALCOLM A. NEAL, Individually and as
Copartners, Doing Business Under the Firm
Name and Style of PROGRESSIVE DE-

HYDRATER COMPANY, DEE HI FOOD
PRODUCTS CO., LORING POWELL,
A. C. ST. MARIE, JOHN DOE, MARY
DOE, RICHARD ROE and SADIE
GREEN,

Defendants.

BILL OF COMPLAINT.

Complainants complain of defendants and for cause of action allege:

I.

That the Rees Blow Pipe Manufacturing Company, Inc., is now, and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the city and county of San Francisco. That plaintiffs are informed and believe, and therefore aver that all of the capital stock of the said Rees Blow Pipe Manufacturing Company, Inc., is now, and at all times hereinafter mentioned was owned by defendants Claude Rees and Charles F. Hine, and that the said Hine and Rees are now and at all times hereinafter mentioned were directors and officers of the said Rees Blow Pipe Manufacturing Company, Inc., and in complete and entire control thereof. [1*]

II.

That the Progressive Evaporator Company, Inc., is now and during all the times hereinafter mentioned was a corporation organized and existing

*Page-number appearing at the foot of page of original certified Transcript of Record.

under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco.

III.

That on the 20th day of February, 1922, the Progressive Evaporator Company, Inc., was organized and its Articles of Incorporation filed in the office of the Secretary of State of the State of California, and in the office of the County Clerk of the city and county of San Francisco, California. The names of the incorporators were: Charles F. Hine, M. A. Neal, Norman Lombard, Loring Powell and Wm. H. Gorrill. That after the filing of said articles, the said Secretary of State issued to the said Progressive Evaporator Company, Inc., a certificate of incorporation, and that the said Progressive Evaporator Company, Inc., is now and ever since the last-mentioned date has been a corporation formed under the laws of the State of California. That said articles provide for a Board of Directors to consist of five (5) members to manage and control the affairs of said corporation; that immediately upon the issuance of said certificate the said incorporators elected and appointed Charles F. Hine, M. A. Neal, Norman Lombard, Loring Powell and Wm. H. Gorrill to be the Board of Directors for the ensuing year. That said Board of Directors remained as such until the 17th day of April, 1922. That on that day the said Gorrill resigned as member of such Board of Directors and the defendant Claude Rees was appointed in his place and stead as a Director of said corporation.

That the Board of Directors of said corporation is now and ever since the 17th day of April, 1922, has been composed of Claude Rees, Charles F. Hine, M. A. Neal and Loring Powell, the defendants above named and Norman Lombard, one of the plaintiffs above named. That on the 10th [2] day of February, 1922, defendants Rees and Hine were the sole and exclusive owners of various and sundry inventions relating to drying apparatus and systems for drying equipments, and were also the owners of various applications to the United States Government for letters patent for said various and sundry inventions relating to drying apparatus and systems for drying equipment. That said applications with their serial numbers and date of filing are as follows:

Application Serial No. 351,538 filed January 15, 1920.

Application Serial No. 429,298 filed December 9, 1920.

Application Serial No. 408,703 filed September 7, 1920.

That said drying apparatus and systems for drying equipment described in said applications, and particularly in the first above-mentioned application, Serial No. 351,538, were new and useful inventions, not known to or used by others in this country, nor patented, nor described in any printed publication in this or any foreign country before the invention and discovery thereof by Claude Rees, one of the above-named defendants for more than two years before his application for a patent there-

for; and not in public use, nor on sale for more than two years prior to his application for a patent therefor; nor had the same been abandoned by him prior to his said application; nor had the said Claude Rees or his legal representatives or assigns made or filed any application for a patent in any foreign country for said inventions more than twelve months prior to his said applications therefor, in this country; that the said Claude Rees did on the dates above mentioned, being the original, first and sole inventor of said inventions duly and regularly make and file in the patent office of the United States the three applications above referred to on the dates respectively set opposite the Serial Numbers thereof. [3]

That between the date of the application for patent and the 18th day of April, 1922, the said Claude Rees assigned to the Rees Blow Pipe Manufacturing Company, Inc., all his right, title, and interest in and to the invention drying equipment and apparatus described in the first above-mentioned application; that after proceedings duly and regularly had and taken in said application bearing Serial No. 351,538, filed January 15th, 1920 on the 18th day of April, 1922, letters patent of the United States, bearing date on that day and numbered 1,413,135 were granted, issued and delivered by the Government of the United States to said Rees Blow Pipe Manufacturing Company, Inc., as successor in interest of Claude Rees, whereby there was granted to it, its successors and assigns, for the full term of seventeen (17) years from the 18th day of

April, 1922, the sole and exclusive right to make, use and sell the said invention relating to drying apparatus and systems for drying equipment throughout the United States of America, and the territories thereof. That said letters patent were issued in due form of law in the name of the United States, and was signed by the Commissioner of Patents of the United States, and prior to the issuance thereof all proceedings were had and taken that were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, which letters patent are ready to be produced in court by these plaintiffs or a duly authenticated copy thereof and profert is hereby made of said letters patent, and a copy of the specifications of letters patent is marked Exhibit "A" attached hereto and by reference made a part hereof for all purposes. That said copy of said letters patent describes the drying equipment and drying apparatus of which the said Claude Rees was the original first and sole inventor. That the applications, Serials Nos. 429,298 and 408,703 have not been granted at the present time as far as these plaintiffs are informed and believe. [4]

That said applications are still pending and relate to the said drying equipment and drying apparatus. That the said Claude Rees was as aforesaid, the original, first and sole inventor of the inventions described in said last two mentioned applications as well as in said letters patent.

IV.

That on the 10th day of February, 1922, de-

defendants Rees and Hine as first parties, and the defendants Rees, Hine and Neal as second parties and as copartners doing business under the firm name and style of Progressive Evaporator Company, offered to enter into an agreement in writing, a copy of which is marked Exhibit "B," attached hereto, and hereby referred to and made a part hereof for all purposes, with the Progressive Evaporator Company, Inc., that above-mentioned corporation as third party. That in and by the terms of said agreement the said Rees and Hine and the said Neal individually, and as copartners in said Progressive Evaporator Company, a copartnership, named in said agreement as the second party, offered to make said agreement with the said corporation, and as a consideration for the making of such agreement, demanded that all the common stock of said corporation, to wit, twenty-five hundred (2,500) shares, should be issued to them or their nominees; That on February 10th, 1922, the said offer of Neal, Rees and Hine was accepted by the Board of Directors of said corporation, and the President and Secretary thereof were authorized to apply to the Commissioner of Corporations of the State of California, for a permit to issue said twenty-five hundred shares of stock to said Rees, Hine and Neal or their assignees, and to sell one thousand shares of the preferred stock of the said corporation for one hundred (\$100.00) dollars per share. [5]

V.

That the authorized capital stock of said Pro-

gressive Evaporator Company, Inc., consisted of twenty-five hundred shares of common stock of said corporation of the value of one hundred (\$100.00) per share, and twenty-five hundred (2,500) shares of preferred stock of said corporation of the par value of one hundred (\$100.00) per share. Previous to the acceptance of the said offer by the said corporation, it had been agreed by and between Norman Lombard, one of the plaintiffs herein, and said Rees, Hine and Neal, that twelve hundred fifty shares of said common stock of said corporation should go to said Neal and twelve hundred fifty shares of said common stock of said corporation should go to Lombard. That thereupon, and in accordance with the said authorization of the Board of Directors, an application was made to the said Commissioner of Corporations for leave to issue said twenty-five hundred (2,500) shares of common stock to said Neal and to said Lombard, and for leave to sell one thousand (1,000) shares of the preferred stock of said corporation at one hundred (\$100) dollars per share. That said Commissioner of Corporations refused to permit the issuance of twenty-five hundred (2,500) shares of common stock to Neal and Lombard, but issued a permit to said corporation allowing it to sell the said one thousand shares of preferred stock at the par value of one hundred (\$100) dollars per share, and to issue to said Neal and Lombard one share of common stock for each share of preferred stock so sold. That the said Rees, Hine and Neal, Lombard and the said corporation on the 17th day of

April, 1922, accepted the permit of said Commissioner of Corporations, and the said Rees, Hine and Neal agreed to enter into an agreement which said agreement is marked Exhibit "B" and is hereto attached and made a part hereof for all purposes, with the corporation upon the [6] issuance to Neal and Lombard of one share of common stock for every share of preferred stock sold by said corporation. That thereafter and on the 17th day of April, 1922, the said corporation and the said Rees, Neal and Hine entered into said agreement marked Exhibit "B" as aforesaid. That thereafter and on the said last-mentioned date, the following shares of preferred stock were subscribed for and paid for by the following named persons:

Name	Number of Shares.
Noman Lombard	One share,
M. A. Neal	One share,
Charles F. Hine	One share,
Loring Powell	One share,
Wm. H. Gorrill	One share,

and certificates representing said shares of stock were issued to each of said persons. That thereafter, and in accordance with the said agreement with the said corporation, a certificate for $2\frac{1}{2}$ shares of common stock was issued to the said Lombard and a certificate for $2\frac{1}{2}$ shares of common stock was issued to the said Neal. That said Lombard is now and ever since the last-mentioned date has been the owner of said share of preferred stock, and the said $2\frac{1}{2}$ shares of common stock of

said corporation. That said Lombard advanced the money to the said Powell to purchase the said share of preferred stock standing in the name of said Powell. That as soon as said share of preferred stock was issued, the said Powell endorsed and delivered the said certificate to the said Lombard and the said Lombard is now, and ever since the last above mentioned date has been, and now is the owner and holder of said certificate of stock, although the same stands of record on the books of the corporation in the name of said Loring Powell.

[7]

VI.

That the said license agreement, a copy of which is marked Exhibit "B" is, and was of exceedingly great value to the said corporation Progressive Evaporator Company, Inc., and constitutes its main capital.

That at the time of the execution of said Exhibit "B" the said Progressive Evaporator Company, Inc., did not know of said assignment of Claude Rees to the Rees Blow Pipe Manufacturing Company, Inc., and did not know that the Rees Blow Pipe Manufacturing Company, Inc., was the owner of the improvement and invention described in said application No. 351,358; that the said Rees and the said Hine and the said Rees Blow Pipe Manufacturing Company, Inc., did not notify or tell the Progressive Evaporator Company, Inc., of said assignment, and that said Rees Blow Pipe Manufacturing Company, Inc., knew that the Progressive Evaporator Company, Inc., was about to

enter into said agreement and was ignorant of the existence of said assignment; that said Rees Blow Pipe Manufacturing Company, Inc., did not in any way notify the said Progressive Evaporator Company, Inc., of said assignment or of its interest in and to the improvement and invention covered by said application; That said agreement was entered into by Rees and Hine, both individually and as agents for and representatives of the Rees Blow Pipe Manufacturing Company, Inc., and that said Rees Blow Pipe Manufacturing Company, Inc., consented to said agreement and adopted said agreement and the terms and conditions thereof as its own acts and deed.

VII.

That on the 17th day of April, 1922, the said Rees Blow Pipe Manufacturing Company, Inc., entered into an agreement [8] with the Progressive Evaporator Company, Inc., wherein and whereby the Progressive Evaporator Company, Inc., agreed to buy ten evaporator plants from the said Rees Blow Pipe Manufacturing Company, Inc., on or before July 1st, 1922, and the said Rees Blow Pipe Manufacturing Company, Inc., agreed to manufacture and deliver to the said Progressive Evaporator Company, Inc., such plants; that by the terms of said agreement the said Rees Blow Pipe Manufacturing Company, Inc., was to be paid the cost of said plants plus twenty-five per cent and plus ten per cent, not exceeding, however, for a four-truck plant, one thousand six hundred sixty-two and 25/100 (\$1,662.25) dollars; for a seven-truck

plant, two thousand three hundred ninety and 91/100 (2,390.91) dollars, and for an eleven-truck plant, three thousand seven hundred ninety and 36/100 (\$3,790.36) dollars, that it was agreed in said agreement that the Progressive Evaporator Company, Inc., should not be required to purchase said evaporator plants from the Rees Blow Pipe Manufacturing Company, Inc., after the 1st of January, 1923.

VIII.

On the 17th day of April, 1922, plaintiff Norman Lombard was appointed president of said corporation, and defendant Loring Powell was appointed as secretary, and from that time continuously up until the first day of November, 1922, the said Lombard was president and the said Powell was secretary of the said corporation. On that date at a meeting of the Board of Directors, in which the said Lombard and the said Powell did not participate, the said Lombard and Powell were removed from their offices as president and secretary, respectively of the corporation, and the said Neal was appointed president and the said Hine, secretary, and the said Rees vice-president of said corporation, and the said Neal and Hine are now and ever since the last-mentioned date have been president, and secretary [9] respectively, of said corporation, elected by themselves and said Rees at said meeting of said board on the 1st day of November, 1922.

IX.

That on the 24th day of October, 1922, a dispute

and controversy' arose by and between Lombard and Powell on the one hand and Rees, Hine and Neal on the other with respect to the management and control of the affairs of the corporation. That thereupon and on the 25th day of October, 1922, the plaintiffs including Lombard, upon the request of Lombard, subscribed for and paid for thirteen (13) shares of the preferred stock of the corporation; that the said corporation received said sum of thirteen hundred (\$1,300.00) dollars therefor, and ever since has had and now has the said sum of thirteen hundred (\$1,300.00) dollars, and thereupon, and after receiving said sum of thirteen hundred (\$1,300.00) dollars, the said corporation issued to the said plaintiffs shares of the preferred stock of said corporation in the amounts set opposite their names, and each of said plaintiffs except Eckholff and Flynn is now and ever since said last date above mentioned has been the owner of the share of stock set opposite his name and of the certificate representing the same.

To Norman Lombard as Trustee of Ellen Lombard, 1 shares.

To Norman Lombard as Trustee for Elizabeth Lombard, 2½ shares.

To Norman Lombard as Trustee for Norman Lombard, 6½ shares.

To Wm. T. Eckhoff, two shares.

To Montgomery Flynn, one share.

The moneys to pay for the Flynn and Eckhoff shares were the moneys advanced by and belonging to Norman Lombard and said Flynn and Eckhoff

received said shares of stock as trustees for said Norman Lombard, and ever since then have held and now hold the said shares of stock as trustee for the said Norman Lombard. Thereafter and on the 27th day of October, 1922, the [10] said Norman Lombard gave notice, in accordance with Section 310 of the Civil Code of the State of California, to the secretary, to call a meeting of the stockholders of the corporation on the sixth of November, 1922, for the purpose of removing the directors of said corporation and electing new directors, and thereupon the said secretary gave the notice as required by the said Norman Lombard. That thereupon the said Rees, Hine and Neal called a meeting of the directors and on the 1st day of November, 1922, as aforesaid, removed Lombard and Powell as president and secretary, respectively, of said corporation. That thereupon the said Hine and Neal notified the Crocker National Bank, the depository in which the funds of said corporation are kept, not to honor any checks signed by Lombard or Powell as president and secretary of said corporation, but only to honor checks signed by Neal and Hine as secretary and president of said corporation, respectively. That thereafter the said Crocker National Bank refused to pay out any funds of the corporation, and the funds of said corporation are now, and ever since the last above mentioned date have been withheld and withdrawn from use by the said corporation.

That thereafter and on the 6th day of November, 1922, and before the time set for the removal of

the directors by the stockholders, Neal, Rees and Powell commenced in the Superior Court of the State of California in and for the city and county of San Francisco, an action to restrain the said plaintiffs from voting the stock issued to them on the 25th day of October, as aforesaid, at the meeting on the 6th day of November, and secured from the said Superior Court a restraining order, restraining the voting of said stock at said stockholders' meeting, and requiring the said plaintiffs to show cause why an injunction pending the trial of said action should not be issued enjoining the [11] voting of said shares issued to said plaintiffs on the 25th day of October, as aforesaid. That said restraining order was served on the said plaintiffs and they were thus prevented from voting said shares of stock at such meeting. That thereafter said order to show cause came on for hearing, and on the 1st day of June, 1922, the Court made its order restraining the plaintiffs in this action during the pendency of that action, from voting said shares of stock, and also restraining the said Rees, Neal and Hine from issuing to themselves certain shares of stock which they were attempting to issue, and from voting certain shares of stock which they had attempted to issue to themselves on the 3d day of November, 1922.

X.

That on or before the 27th day of October, 1922, said Neal, president and a director of said corporation, and said Hine, and the said Rees officers and directors of said corporation and said Rees Blow

Pipe Manufacturing Company, Inc., with intent to defraud the said corporation and its other stockholders and with intent to deprive the said corporation of its license agreement which constituted its most valuable asset, and its reason for existence, and with the intention of depriving the said Lombard and the other plaintiffs of all of their interests in and to the said license agreement, and in and to the devices and inventions covered thereby, entered into an agreement and a conspiracy and scheme whereby it was agreed that the said Rees, Hine and Neal should obtain and secure the control and management of the said corporation, and should prevent and obstruct the carrying on of the business of said corporation and the prosecution of sales of said drying apparatus and equipment by it, and thereafter that the said Rees and Hine should pretend and attempt to cancel the said license agreement on the ground of noncompliance [12] therewith by said corporation. That thereafter said Rees and Hine and Rees Blow Pipe Manufacturing Company, Inc., should make a similar license agreement with the said Neal and the defendant Ward who should operate and carry on business thereafter as copartners under the firm name and style of Progressive Dehydrater Company.

XI.

That in accordance with said agreement, scheme and conspiracy, the said Neal, Hine and Rees were elected as aforesaid as president, secretary and vice-president of the corporation, respectively, and took over and secured the books, records and papers of

the said corporation, and the funds of the said corporation, and changed the offices of the said corporation from the First National Bank Building, San Francisco, to the Humboldt Savings Bank Building, San Francisco, and secured the said injunction to prevent the said Lombard from regaining the control and management of said corporation and prevent said Lombard and Powell from carrying on its business and affairs.

XII.

That thereafter and from November 1st, 1922, the date of the appointment of said Neal, Hine and Rees, as president, secretary and vice-president of said corporation, respectively, as aforesaid, and the date of the removal of said officers, the said Neal, Hine and Rees, in opposition to the said Lombard and Powell exercised the control and management of said corporation. That after securing the said control the said Hine, Neal and Rees made no attempt of any kind or character whatsoever to carry on the business of said corporation, to prosecute the sale of the drying apparatus and equipment under said license agreement, or to carry on its business in any way whatsoever, excepting the collection of money due, it, and the payment of its debts, and [13] except such acts as they deemed necessary and expedient for the liquidation of the business of said corporation. That no business was carried on at the new office of said corporation in the Humboldt Bank Building; that no office force was employed; and that no one stayed in said office in charge of its affairs; that practically all of the

time after the removal of said office to the said Humboldt Bank Building, it has been closed and there has been no one there to take any orders for equipment or to do any business on behalf of said corporation.

XIII.

That during the year 1922, from the date of the organization of said corporation up to and including the 27th day of October, 1922, the said corporation had sold twenty-three (23) drying plants of various truck capacities, and accordingly there became due to said defendants Rees, Hine and Rees Blow Pipe Manufacturing Company, Inc., as royalties on said twenty-three (23) plants, various sums of money; that said twenty-three (23) plants were manufactured by the Rees Blow Pipe Manufacturing Company, Inc., in accordance with the agreement between the said corporation and said Rees Blow Pipe Manufacturing Company, Inc., and accordingly during the year 1922, there became due to the said Rees Blow Pipe Manufacturing Company, Inc., from the said corporation for the manufacturing of the plants, various sums of money. That said Rees Blow Pipe Manufacturing Company, Inc., never rendered to the Progressive Evaporator Company, Inc., any statement of the cost of the manufacture of said plants; that during the year 1922 up to October 27 bills were rendered for the said royalties and for the maximum amount per plant which the agreement, set forth in paragraph seven hereof provided that the charge of the Rees Blow Pipe Manufacturing Company, Inc., should

not exceed. That said bills [14] did not contain any statement of the cost of manufacture of the said plants and the Progressive Evaporator Company, Inc., was never notified thereof. The said bills were all rendered on statements of the Rees Blow Pipe Manufacturing Company, Inc., and from time to time the said Progressive Evaporator Company, Inc., paid certain sums of money to the defendants Rees and Hine and Rees Blow Pipe Manufacturing Company, Inc., on the said statements as rendered, and on account of the amounts shown due thereon, without specifying to what particular item the said amounts were to be applied, and with the understanding that any payment on account of said statements as rendered was not to be considered as an admission by the Progressive Evaporator Company, Inc., that the Rees Blow Pipe Manufacturing Company was entitled to the maximum amount for each of said plants as provided in the agreement set forth herein in paragraph seven (7), and also not to be considered as a waiver by the Progressive Evaporator Company, Inc., of its rights for an accounting from the Rees Blow Pipe Manufacturing Company, Inc., of the costs of manufacture of each and every one of said plants.

And the said Progressive Evaporator Company, Inc., gave to the said Rees, Hine, and the Rees Blow Pipe Manufacturing Company, Inc., and they received and accepted from it, collateral security for any balance remaining unpaid on said statements after such cash payments.

That the amount of cash paid them exceeded the amount due at any time to them for royalties according to the terms of said license agreement marked Exhibit "A."

That the said Rees and Hine, never, at any time, advised the said Progressive Evaporator Company, Inc., although they were two of the directors thereof, that they were not accepting the money paid on account of the royalties due, but were treating the royalties account as unpaid and in default. [15]

XIV.

That on the 13th day of January, 1923, at a pretended meeting of the directors of said corporation at which Hine, Neal and Rees only were present, and of which meeting the said Lombard and Powell had no actual notice, in pursuance of said fraudulent agreement, scheme and conspiracy the said Rees and Hine pretended to give to said Neal as president of the corporation, a notice of the cancellation of the said license agreement, and attempted and pretended to cancel the said license agreement on account of the alleged failure of the said corporation to pay the said royalties to them, and the said Neal as president of said corporation pretended to accept on behalf of said corporation, the said notice of cancellation. That the said Rees Blow Pipe Manufacturing Company, Inc., has never given any notice of any cancellation of said license agreement and has never attempted to cancel the said license agreement. That the said notice of cancellation given by said Rees and Hine, and the pretended can-

cellation by them was a sham and fraud and made with intent to defraud the said corporation as aforesaid, and in pursuance of said fraudulent agreement, scheme and conspiracy.

XV.

That plaintiffs are informed and believe and therefore aver that thereafter and on the 13th day of February, 1923, the said Neal and Ward filed in the office of the County Clerk of the city and county of San Francisco, a certificate of partnership in words and figures following, to wit:

“We, the undersigned do hereby certify as follows:

I.

That we are residents of the city and county of San Francisco, State of California:

II.

That we are the sole members of a partnership doing business under the name and style of ‘Progressive Dehydrater Co.’ [16]

IN WITNESS WHEREOF we have hereunto set our hands this 13th day of February, 1923.

(Signed) MALCOLM A. NEAL.

EDWARD B. WARD.

(Acknowledged before Charles E. Keith, N. P. Feb. 13, 1923. Endorsed: Filed Feb. 13, 1923; No. 7413, Dudley D. Sales, Attorney at law, 58 Sutter St., San Francisco, Calif.)”

That previous to the formation of said copartnership defendants, Rees, Hine and Rees Blow Pipe Manufacturing Company, Inc., entered into a license

agreement with the said Neal and Ward, similar to the license agreement executed and delivered by them to the said corporation, and the Rees Blow Pipe Manufacturing Company, Inc., entered into a manufacturing agreement with the said Neal and Ward, similar to the one which they had with the said corporation. That thereafter the said Neal, Rees and Hine, entirely neglected the business of the said Progressive Evaporator Company, Inc., and disregarded and ignored its rights in all particulars, and in violation and infringement of the patent rights and of the letters patent covered by the said license agreement, in which the said corporation has an interest by virtue of said license agreement, the said Rees and Hine, and the Rees Blow Pipe Manufacturing Company, Inc., and the said defendants Neal and Ward individually, and as copartners have manufactured and sold and are now manufacturing and selling the said patented devices, and that said defendants last above mentioned ever since the 13th day of January, 1923, in pursuance of said fraudulent conspiracy and scheme have infringed and violated the said rights secured by said patents above referred to, and the interests of the Progressive Evaporator Company, Inc., to said patent rights created by said license agreement. That the said license agreement in paragraph fifteen thereof provides that in the event of infringement, the corporation may request Rees and Hine [17] to prosecute a suit for infringement, and that if no such infringement suit is brought within ninety days after service of such

written request, then the corporation may, at its option prosecute such suit.

That as the said infringement has been caused by, and is committed in pursuance of the said fraudulent scheme and conspiracy of the said defendants, Rees, Neal and Hine, and as the said Rees and Hine are the persons infringing the said contract, and as the said corporation and said Rees Blow Pipe Manufacturing Company, Inc., are in the control of the said Rees, Neal and Hine, no notice has been given of said infringement as provided by said Section Fifteen of said license agreement as the giving of such a notice is useless.

XVI.

That in order to prevent the carrying out of the said conspiracy and the divesting of the said corporation of its license agreement, the said Lombard resisted the attempt of the said defendants Rees, Neal and Hine to remove him as president of the corporation, and individually and as trustee purchased the additional shares of stock which he was enjoined from voting as aforesaid, and attempted by all legal means to prevent the defendants Rees, Neal and Hine from securing the control of said corporation and stopping the prosecution of its business, and bringing about the attempted cancellation of its license agreement as aforesaid, and its dissolution, but that said Lombard was unsuccessful in preventing the acts of said defendants as aforesaid.

XVII.

That as the defendants are in control and manage-

ment of said corporation and have repeatedly claimed and maintained that the said license agreement is cancelled and that the said corporation has no right to operate thereunder, [18] or to sell the devices referred to therein, that no demand has been made upon the Board of Directors to commence this action for the infringement of said patent rights, and that this action is commenced by this complainant as a stockholder of said corporation on its behalf. That up to October 27, 1922, the said corporation had performed all the terms and conditions required of it to be performed by the terms of said license agreement, and that thereafter the failure on its part to perform any of the terms thereof in any respect whatsoever was prevented by the acts of the defendants Rees, Hine and Neal, and the Rees Blow Pipe Manufacturing Company, Inc., as hereinabove set forth.

XVIII.

That if the defendants are allowed to continue the manufacture and sale of said devices and the infringement of said patent and patent rights, the said corporation and its stockholders will be irreparably injured, and instead of having the exclusive rights granted to it by said license agreement, the said corporation will be obliged to compete with the said defendants at a time when it is under the control and domination of three of said defendants, and will, consequently be unable to prosecute or carry on any business whatsoever to its irreparable loss and injury. That the defendants Dee Hi Food Products Company, A. C. St. Marie with full

knowledge of the facts set forth hereinbefore and well knowing the rights of the Progressive Evaporator Company, Inc., as set forth herein, to exclusively manufacture and sell the said drying systems and equipment, have assisted, and are now assisting and aiding and abetting the defendants, Rees, Hine, Neal, Ward and the Rees Blow Pipe Manufacturing Company, Inc., in the manufacture and sale of said devices, drying systems and equipment, and in the infringement of said patent and patent rights; that the acts and doings of said respondents are contrary to equity and good conscience, and manifestly wrong and injurious to the said plaintiffs and the Progressive Evaporator Company, Inc.; [19] that the said respondents threaten and declare that they will continue to infringe upon said patent and patent rights unless restrained by the process of this Court.

XIX.

That by reason of the premises and the threats and unlawful acts of the respondents aforesaid, the plaintiffs and the Progressive Evaporator Company, Inc., have suffered great and irreparable injury and damage, the exact amount of which is unknown, and can be estimated only by an accounting, and the defendants have realized as these plaintiffs are informed and believe, and therefore aver, large gains, profits and advantages from and by reason of said infringement the exact amount of which is unknown to these plaintiffs, and can only be ascertained by an accounting.

XX.

That the amount and value of the property and rights in controversy in this action, inclusive of interest and costs exceeds the sum of Three Thousand (\$3,000) Dollars.

WHEREFORE these plaintiffs pray that the defendants, their agents, servants, attorneys, workmen and employees and each of them be perpetually enjoined by this Court from infringing the said letters patent, and from interfering with it or violating in any way the exclusive right of the said Progressive Evaporator Company, Inc., to manufacture and sell the device covered by the terms of said letters patent as required by the terms and provisions of said license agreement.

Second. That the said defendants be required and pay over to the Progressive Evaporator Company, Inc., the gains, profits and advantages realized by them and each of them from said infringement of the rights of the said Progressive Evaporator Company, Inc., and that said defendants be required to pay to said Progressive Evaporator Company, Inc., treble damages [20] sustained by it from and by reason of the said infringement, both actual and threatened, together with costs of court and the costs and disbursements of these plaintiffs, on behalf of said Progressive Evaporator Company, Inc., including reasonable attorneys' fees incurred by these plaintiffs in the prosecution of this action, and for such other and further relief as to this Court may seem meet and equitable.

KEYES & ERSKINE,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco,—ss.

Norman Lombard, being duly sworn deposes and says:

That he is one of the plaintiffs named in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief and as to those matters he believes it to be true.

NORMAN LOMBARD.

Subscribed and sworn to before me this 6th day of August, 1923.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of
San Francisco, State of California. [21]

EXHIBIT "A."

C. REES.

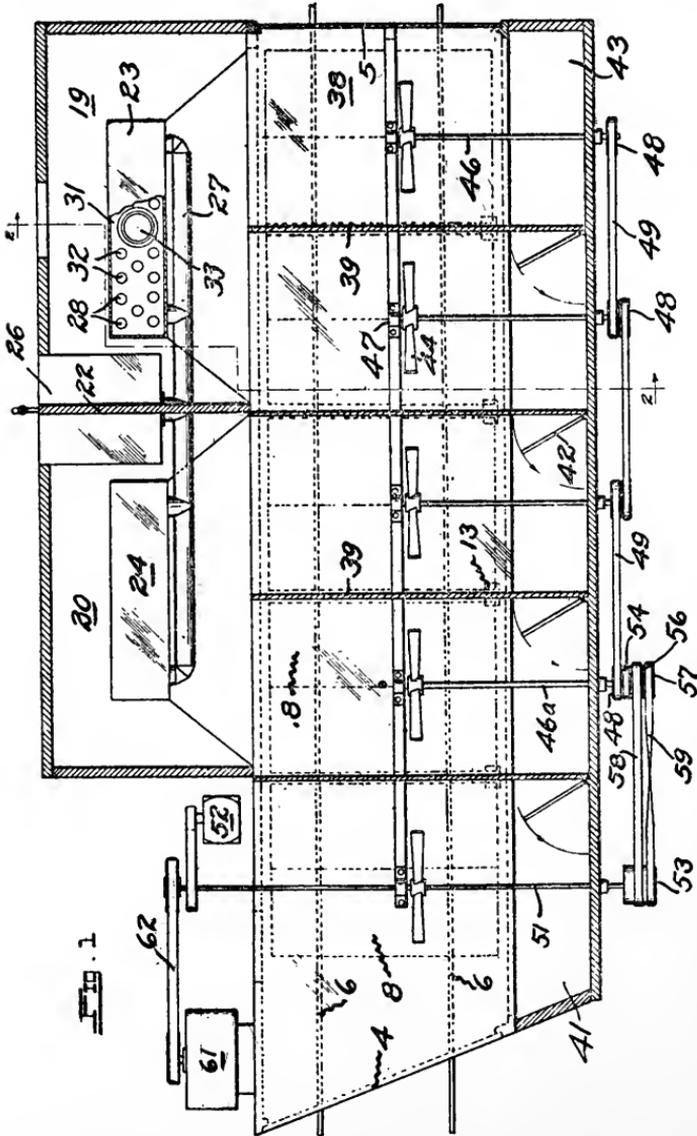
DRYING APPARATUS.

APPLICATION FILED JAN. 15, 1920.

Patented Apr. 18, 1922

4 SHEETS—SHEET 1.

1,413,135.



Witness:
G. S. Evans

INVENTOR
CLAUDE REES

White & Rees
his ATTORNEYS

C. REES.

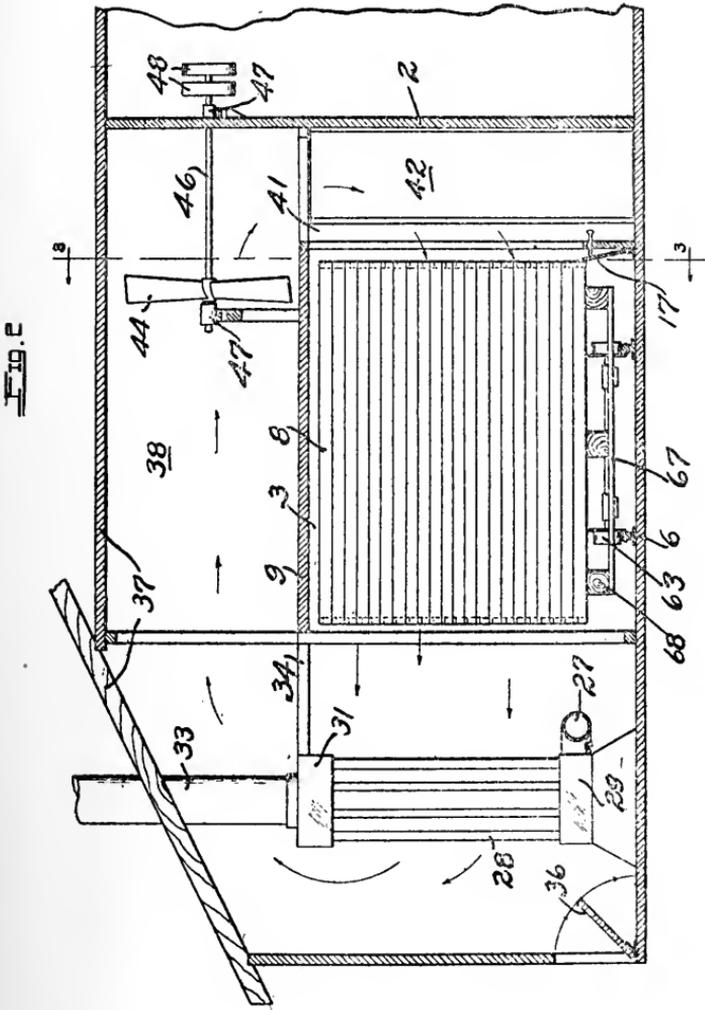
DRYING APPARATUS.

APPLICATION FILED JAN. 15, 1920.

Patented Apr. 18, 1922.

4 SHEETS—SHEET 2.

1,413,135.



Witness:

C. S. Evans

Inventor
CLAUDE REES.

by White & Root
his Attorneys

C. REES.

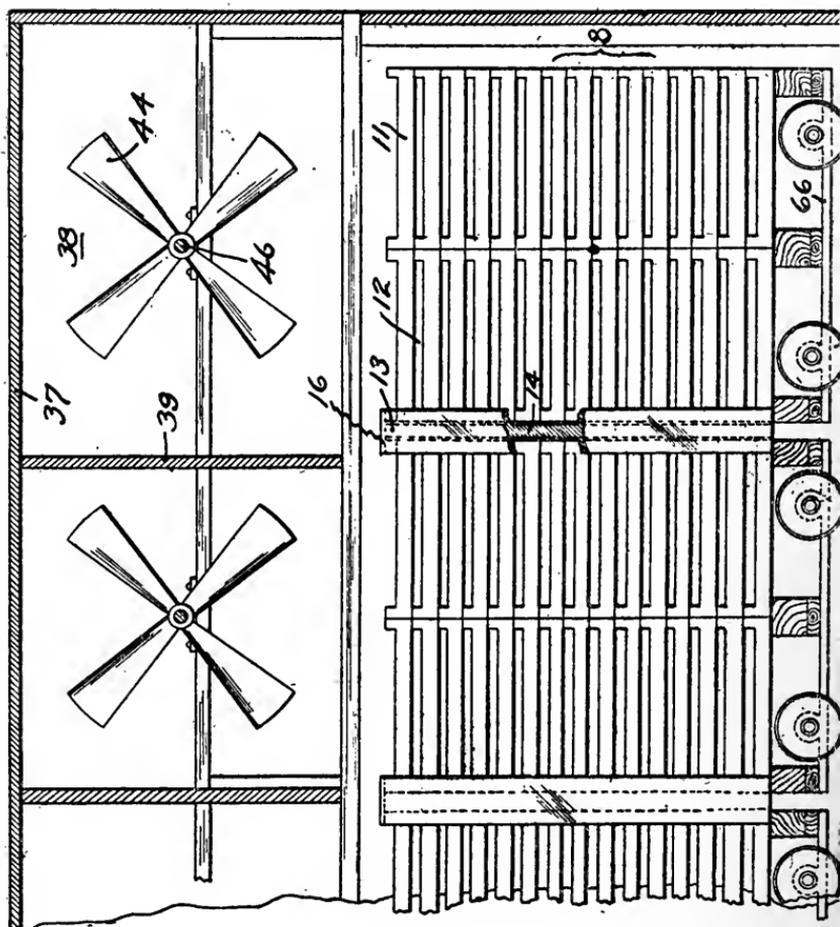
DRYING APPARATUS.

APPLICATION FILED JAN. 15, 1920.

1,413,135.

Patented Apr. 18, 1922

4 SHEETS—SHEET 3.



30

Witness:
G. S. Evans

INVENTOR
CLAUDE REES

White & Proctor
his ATTORNEYS

C. REES.

DRYING APPARATUS.

APPLICATION FILED JAN. 15, 1920.

Patented Apr. 18, 1922

4 SHEETS—SHEET 4.

1,413,135.

Fig. 4

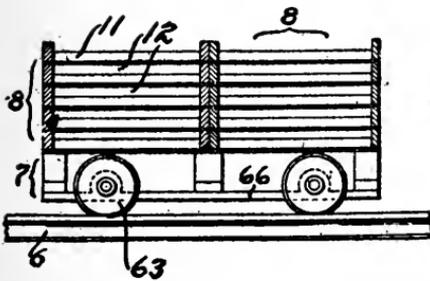
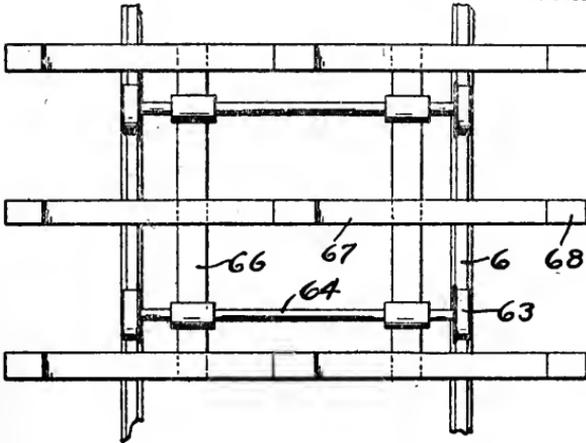


Fig. 5

Witness:
C. S. Evans

INVENTOR
CLAUDE REES.

White & Root
his ATTORNEYS

UNITED STATES PATENT OFFICE.

CLAUDE REES, OF SAN FRANCISCO, CALIFORNIA, ASSIGNOR TO REES PIPE MANUFACTURING COMPANY OF SAN FRANCISCO, CALIFORNIA CORPORATION OF CALIFORNIA.

DRYING APPARATUS.

1,413,135.

Specification of Letters Patent.

Patented Apr. 1920.

Application filed January 15, 1920. Serial No. 351,538.

To all whom it may concern:

Be it known that I, CLAUDE REES, a citizen of the United States, and a resident of the city and county of San Francisco and State of California, have invented a new and useful Drying Apparatus, a portion of the wall being sectioned in a plane to show the air inlet, of which the following is a specification.

My invention relates to devices for drying fruit and other products.

An object of the invention is to provide a dryer giving a dried product of even moisture content.

Another object of the invention is to provide a drier in which a continuous succession of fruit or other material may be economically dried.

The invention possesses other features of advantage, some of which, with the foregoing, will be set forth in the following description of the preferred form of my invention which is illustrated in the drawings accompanying and forming part of the specification. It is to be understood that I do not limit myself to the showing made by the said drawings and description, as I may adopt variations of the preferred form within the scope of my invention as set forth in the claims.

In the drawings, Figure 1 is a horizontal section. Figure 2 is a vertical sectional view, the plane of section being indicated by the line 2—2 of Figure 1. Figure 3 is a vertical sectional view of a portion of the drier, the plane of section being indicated by the line 3—3 of Figure 2. Figure 4 is a plan view of the truck on which the trays are piled in two tiers. Figure 5 is a side elevation of the truck loaded with trays.

In terms of broad inclusion the drier of my invention comprises a drying chamber through which a succession of trays containing the material to be dried is passed. Means is provided for heating air and circulating the heated air about the trays, the mass of heated, moisture-absorbing air progressing in a substantially helical path passing through the trays, from the tray exit to the tray entrance, where it passes out of the apparatus. Thus the entering material is subjected to warm air laden with moisture accumulated from the material ahead. If the moisture content of the entering fruit is heavy, evaporation begins. If portions of

the material are already partially evaporated, evaporation of such portions does not begin at this point, and there may be at first a slight absorption of moisture by the material from the warm moist air currents. As the material progresses through the drying chamber, the air currents are dried and warmer, until at the end, the material is subjected to currents of fresh air heated to the point required to bring the material to the desired condition prior to discharge. Material of varying degrees of moisture content may be treated, the drying of the drier portions being delayed and all material being brought prior to discharge to the same moisture content. This is true in a product of uniform character and it is unnecessary to segregate lots of material for separate treatment where the material initially presents different degrees of dryness. The apparatus also includes means for transporting the trays through the drying chamber, and control means for controlling the air currents in a substantially helical path through the laden trays.

Considered in detail, my drier comprises a housing 2 enclosing a long drying chamber 3 extending longitudinally through, and with an entrance door 4 and an exit door 5 closing the opposite ends. Rails 6 are provided upon which the trucks are adapted to run through the chamber. Each of the trucks is adapted to be loaded with two tiers of trays 7, the trays extending nearly to the ceiling of the drying chamber and extending from side to side, leaving only space between them sufficient to clear the walls, as shown in Figure 2. The laden trucks are rolled into the drying chamber after the other and are closely spaced together. The trays are so formed and arranged on the trucks and the position of the tiers of stacked trays in the drying chamber and the construction of the drying chamber are such that heated air may be circulated through the tiers of trays only from side to side of the heating chamber. The end trays are made with end pieces 8, Figure 5, narrower than the long side trays so that when the trays are stacked a passage 12 is formed between the material in one tray and the bottom of the next tray above. As shown in Figure 5, the tiers on each truck are set

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ether so that no passage is provided between the tiers. In order to block any passage between the adjacent tiers on adjacent trucks, a flanged panel 13 is disposed between such tiers as the trucks are run into the chamber. These panels are formed with a longitudinally disposed flange 14 extending between the adjacent tiers to prevent the panel from being displaced, and a transverse flange 16 at the top looking over the top trays and pendently supporting the panel. The passage under the trays and around the trucks is blocked by a pivotally arranged panel 17 extending longitudinally through the chamber and adapted to extend from the floor close to the ends of the bottom trays. Thus, except for a certain amount of leakage which is desired, the heated air introduced on one side of the heating chamber, that is to say, to one end of each of the laden trays, must flow through the passages 12 and over the material in the trays to reach the other side; that is, the movement of the air through the tiers is transversely of the drying chamber. Arranged within the housing and extending along one side of the drying chamber are heating chambers 19 and 20 separated by the wall 22. Heating devices 23 and 24 are arranged in the heating chambers and are supplied with hot gases and products of combustion from a furnace 26 disposed between the heating devices, and connected thereto by conduit 27. Each heater consists of a series of tubes 28 at each end, each series connected at the bottom into a header 29 into which the conduit 27 discharges. At the top the tubes are connected into a header 31 extending across the top of the heater and into which a second series of tubes 32 is connected on each side of the stack 33. The stack extends through the heater and at the lower end is connected into a header, lying between headers 29 and into which the lower ends of each series 32 is connected.

Reference is made to co-pending application #408,703, filed September 7, 1920, for complete disclosure of the type of heater here referred to and not claimed.

The hot gases and products of combustion from the furnace thus pass through the conduits 27, upwardly through tubes 28 and downwardly through tubes 32 and upwardly in the stack, the lower ends of series 28—32 separated by a partition not shown heating the tubes and stack. The flange 9 of the drying chamber is extended to the wall 34, so that air emerging from the tiers of trays, as shown by the arrows

in Figure 2, necessarily passes between and around the heated tubes, and absorbs heat therefrom. The chamber 20 is closed to outside air, but chamber 19 is provided with an air inlet adjustable by the door 36, and

fresh air is drawn constantly through this inlet to compensate for the moisture laden air discharged from the housing.

Above the heating and drying chambers a space is left between the walls 9—34 and the roof 37 of the housing. Above the drying chamber this space is divided into a plurality of passages 38 by the vertical walls 39. At one end (left of Figure 2) these passages open into the upper part of the heating chambers and at the other end they open into the upper part of a passage 41, extending along the drying chamber on the side opposite to the heating chambers. Alined with the walls 39 are doors 42 in the passage 41. Closure of these doors prevents air currents moving lengthwise through the passage, and divides the passage into a number of chambers 43 opening on the inside into the heating chamber and at the top into the passages 38. Thus a complete circuit is formed for the flowing of air through the drying and heating chambers, then up and through the passages 38, downwardly into the chambers 43 and again through the trays in the drying chamber. If the doors 42 were closed, the air would continue to circulate in this manner indefinitely except for slight leakage. However under usual conditions it is desired that the air shall also progress from one end of the apparatus to the other while it is circulating in the path just noted and so the doors 42 are adjusted to permit the flowing of air therethrough, so that a portion of the mass of air may be continuously diverted to pass through the next series of passages around and through the trays in the drying chamber. The doors are therefore means for varying the speed at which the mass of air moves longitudinally through the drying chamber relative to its speed transversely through the tiers, or expressed in another way, they are the means for varying the number of turns in the helical path in which the air moves through the drying chamber, whereby the number of times which a given mass of air passes over the same lot of drying material is readily controlled.

Means are provided for mechanically inducing the flow of air currents in the passages described. In each passage 38, a fan 44 is fixed on the shaft 46 supported in suitable bearings 47. The ends of the shafts project through the housing and carry on their ends crown face pulleys 48 upon which belts 49 are arranged. At one end of the housing a line shaft 51 is journaled, and arranged to be driven by the motor 52. The other end of the line shaft is equipped with a wide, straight face tight pulley 53. The adjacent fan shaft 46a is provided with a crown face pulley 48 for the belt 49. Next to it are closely spaced a tight crown face pulley 54, a loose crown face pulley 56 and 1

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a tight crown face pulley 57 in the order named. An open belt 58 and a cross belt 59 connect the pulley 53 to the pulleys 54 and 56 or 56 and 57, and the usual belt shifting means is provided for shifting the belts 58 and 59 so that the fans 44 may be run in either direction. In order to facilitate the even drying of material, I find it expedient to reverse the fans and the direction of flow of the air currents from time to time.

In order to insure the forward progress of the air currents, I provide a suction fan 61 driven by belt 62 from the line shaft and arranged to draw air from the end of the housing adjacent the truck entrance. Thus under the influence of the fans 44 and the fan 61, and with the doors 42 adjusted in an open position, the air, with constant accretions of fresh air through the aperture controlled by the door 36, circulates in a substantially helical path, around and around through the passages and through the trays once on each complete circuit, meanwhile advancing slowly longitudinally of the drying chamber from the truck discharge end of the housing toward the truck entrance, receiving a secondary heating as it passes through the heating chamber 20 and finally discharging into the open air through the fan 61. From time to time the direction of motion of the air currents transversely through the trays and passages 38 is reversed, but in either direction the action of the fan 61 induces the forward progression or longitudinal movement of the air as it accumulates moisture from the drying material.

While any suitable truck will do, I prefer to use one made as shown in Figures 4 and 5 and comprising wheels 63 joined by an axle 64 at each end. Frame members 66 are underslung upon the axles and transverse members 67 are secured to them, blocks 68 being provided on which the lowermost trays of the tiers rest closely adjacent to the wheels.

I claim:

1. A drying apparatus comprising a drying chamber, heating chambers along one side of the drying chambers, a passage along the opposite side of said chambers, a ceiling covering the drying chamber and forming a reverse air space connecting the heating chambers and the said passage, tiers of supports for material which is arranged to form superposed, spaced layers, and means for causing heated air to circulate in a helical path and along the spaces between the said layers.

2. A drying apparatus comprising a drying chamber, means for regulating the inlet of air, means for creating a substantially helical current of air traversing said drying chamber and progressing longitudinally therethrough, means for heating said air

current, and means arranged with chamber for varying the speed at which current progresses longitudinally said drying chamber relative to its reverse speed.

3. A drying apparatus comprising a drying chamber, means for creating a substantially helical current of air traversing said drying chamber once in each complete circuit of the helix and progressing longitudinally therethrough, means for heating said current, means for regulating the speed at which said air, means for varying the number of turns of the helical path in which said air current flows, and trays forming spaces between which the air passes horizontally.

4. A drying apparatus comprising a drying chamber, in which are arranged a plurality of horizontal passages, means for creating a substantially helical current of air traversing said drying chamber once in each complete circuit of the helix and progressing longitudinally therethrough, means for heating said current, means for controlling the speed at which said air, means for varying the speed at which said current progresses longitudinally through said drying chamber relative to its transverse speed.

5. A drying apparatus comprising a drying chamber, means for creating a substantially helical current of air traversing said drying chamber once in each complete circuit of the helix and progressing longitudinally therethrough, means for heating said current, means for varying the speed at which said current progresses longitudinally through said drying chamber relative to its transverse speed, means for passing material through said drying chamber, and means for reversing the direction of movement of said current transversely through said chamber.

6. A drying apparatus comprising a drying chamber, means for creating a substantially helical current of air traversing said drying chamber once in each complete circuit of the helix, means for varying the speed at which said air current flows, means for maintaining said air current at substantially an even temperature, means for providing constant accretions of fresh air to said current, means for directing the air current through said drying chamber relative to its transverse speed, means for providing constant accretions of fresh air to said current, means for directing the air horizontally between the trays.

7. A drying apparatus comprising a drying chamber, means for creating a substantially helical current of air traversing said drying chamber once in each complete circuit of the helix and progressing longitudinally therethrough, means for heating said current, means for varying the speed at which said current progresses longitudinally through said drying chamber relative to its transverse speed, means for passing material through said drying chamber, and means for reversing the direction of movement of said current transversely through said chamber.

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transverse speed and means for reversing direction of movement of said current transversely through said drying chamber.

9. A drying apparatus comprising a drying chamber, means for creating a substantially helical current of air traversing said drying chamber once in each complete turn of the helix and progressing longitudinally through said drying chamber, means for heating said air current, means for varying the speed at which said current progresses longitudinally through said drying chamber relative to its transverse speed, means for reversing the direction of movement of said current transversely through said drying chamber, and means for passing a succession of material to be dried through said drying chamber.

10. A drying apparatus comprising a drying chamber, tiers of trays in said chamber for the material to be dried and arranged with a passage above the material on each tray extending through the tiers transversely through said chamber; the trays arranged in close juxtaposition to prevent by-pass of air, means for flowing a mass of heated air transversely across said drying chamber and substantially wholly through said passages, and means for permitting the gradual progression of said mass of air longitudinally through said drying chamber.

11. A drying apparatus comprising a central drying chamber, a longitudinal row of supports in said chamber for the material to be dried and arranged with a horizontal passage above layers of the material on each tier extending through the tiers transversely only of said chamber, means for flowing a mass of heated air transversely across said drying chamber and through said passages, means for permitting the gradual progression of said mass of air longitudinally through said drying chamber, and a central tunnel along the drying chamber.

ing chamber, tiers of trays in said chamber for the material to be dried and arranged with a passage above the material on each tray extending through the tiers transversely only of said chamber, means for flowing a mass of heated air transversely across said drying chamber and through said passages, means for permitting the gradual progression of said mass of air longitudinally through said drying chamber, means for conveying a succession of tiers of trays through said drying chamber, and means for reversing the direction of movement of said mass of air transversely through said passages.

12. A drying apparatus comprising a drying chamber, tiers of trays in said chamber for the material to be dried and arranged with a passage above the material on each tray extending through the tiers transversely only of said chamber, means for conveying a succession of tiers of trays through said drying chamber, heating chambers opening upon the side of said drying chamber and the passages through said tiers, a plurality of passages communicating with said heating chambers and opening upon the opposite side of said drying chamber and the opposite ends of the passages through said tiers, a fan in each of said communicating passages for inducing a current of air through said tiers, heating chamber and communicating passages, means for driving said fans in either direction, means for controlling the leakage of air currents between the successive tiers and below the trucks, and means for causing a gradual progression of the mass of air in said air currents longitudinally through said drying chamber and the succession of tiers of trays therein.

In testimony whereof, I have hereunto set my hand at San Francisco, California, this 8th day of January, 1920.

CLAUDE REES.

EXHIBIT "B."

AGREEMENT.

THIS AGREEMENT, made and entered into this 10th day of February, 1922, by and between CLAUDE REES and CHARLES F. HINE, hereinafter designated the First Parties, and CLAUDE REES, CHARLES F. HINE and M. A. NEAL, copartners doing business under the firm name of PROGRESSIVE EVAPORATOR COMPANY, hereinafter designated the Second Parties, and PROGRESSIVE EVAPORATOR COMPANY, INC., a corporation organized and existing under the laws of the State of California, hereinafter designated the Third Party,

WITNESSETH:

WHEREAS, the First Parties are the sole and exclusive owners of various and sundry inventions respectively relating to "Drying Apparatus" and to "Systems for Drying Substances," and also of the following various and sundry applications for letters patent of the United States and foreign countries for said inventions, and of the following letters patent of Mexico thereon, to-wit:

Application Serial No. 351,538, filed January 15, 1920, for letters patent of the United States for Drying Apparatus;

Application Serial No. 253,230, filed April 11, 1921, for letters patent of Canada for Drying Apparatus;

Application Serial No. 110, filed January 13, 1921, for letters patent of Australia for Drying Apparatus;

Application Serial No. 429,298, filed December 9, 1920, for letters patent of the United States for System for Drying Substances;

Application Serial No. 253,292, filed April 12, 1921, for letters patent of Canada for System for Drying Substances;

Application No. 45,788 filed May 2, 1921, for letters patent of New Zealand for System for Drying Substances; [34]

Application No. 6,859, filed April 12, 1921, for letters patent of India, for system for Drying Substances;

Application No. 142,690, filed March 31, 1921, for letters patent of France for System for Drying Substances;

Application for letters patent of Chile, filed May 19, 1921, for System for Drying Substances;

Application No. 19,143, filed April 8, 1921, for letters patent of Holland for System for Drying Substances;

Application Serial No. 408,703, filed September 7, 1920, for letters patent of the United States for Radiator for Drying Apparatus; and

Letters patent of Mexico, No. 20,203, issued April 21, 1921, for System for Drying Substances; and

WHEREAS, the Second Parties, under said firm name of Progressive Evaporator Company, have been and now are engaged in the business of manu-

facturing and selling devices embodying the said inventions, or some of them; and

WHEREAS, the Third Party desires to secure a license in respect to said inventions together with the option of purchasing all said letters patent which have been, or may be hereafter, respectively issued thereon and, also, desires to purchase said business of the Second Parties, together with the goodwill thereof,

NOW, THEREFORE, in consideration of One Dollar (\$1) and other valuable consideration, received by the First Parties and the Second Parties from the Third Party, and in consideration of the mutual covenants of said parties as hereinafter set forth; it is covenanted and agreed by and between said parties as follows:

1. The First Parties hereby grant to the Third Party, for the respective lives of any United States and foreign letters patent respectively issued for said inventions, unless this [35] license agreement be sooner terminated as hereinafter provided, the exclusive right and privilege, throughout the United States of America and the territories and territorial possessions thereof, and throughout the foreign countries in which said letters patent thereon are applied for and/or issued or granted to the First Parties, of making and selling, for use in drying food substances, but for no other use, devices embodying said inventions, or any of them, respectively disclosed in said pending applications and in said letters patent of Mexico, and/or embodying any or all of the improvements embodying said

inventions, or any of them, plus some modification thereof and/or addition thereto and which improvements were heretofore or may be hereafter, during the life of this agreement, made by the First Parties or by either of them, and also, for such use, but for no other use, devices, in the said use of which, said inventions and/or said improvements thereon are practiced, and also of making and selling for use in drying edible fruits and vegetables, but for no other use, devices embodying any or all other inventions, adopted for such specific use for drying fruits and/or vegetables, and made heretofore or during the life of this agreement by said First Parties, or by either of them, and also devices, in the use of which for drying edible fruits and/or vegetables, said other inventions are practiced; it being understood and agreed that the First Parties reserve to themselves all rights in respect to said inventions, respectively disclosed in said pending applications and Mexican letters patent, and in respect to said specific character of improvements thereon, excepting the rights hereby granted to the Third Party in respect to the exclusive practice of said inventions and/or improvements in the drying of food substances; and that the First Parties also and further reserve to themselves all rights in respect to such other inventions (not disclosed in said pending applications and Mexican letters patent and not constituting such specific [36] character of improvements on the inventions respectively disclosed in such pending applications and Mexican letters patent), excepting the rights hereby granted

to the Third Party in respect to the exclusive practice of such other inventions in the drying of edible fruit and/or vegetables.

2. In the event that, at any time during the life of this agreement, the First Parties receive a *bona fide* offer for the purchase of all or of any of said foreign letters patent (subject to the nonexclusive license thereunder to the Third Party, as hereinafter provided for), the First Parties shall, in respect to any such proposed sale of said patents, provide for the deposit, by the proposed purchaser thereof, in escrow of the total amount to be paid on the purchase price therefor within one year thereafter, together with a copy of the agreement containing the terms and conditions of said proposed sale, which shall be subject to the option hereby granted the Third Party of purchasing said patents on similar terms, and, within twenty days after the deposit of said sum, the First Parties shall give the Third Party written notice of the terms and conditions of such proposed sale, and, in the event the Third Party, at any time within sixty days after receiving said notice, complies with all the terms and conditions of such proposed sale to such proposed purchaser, the First Party shall, thereupon, sell said foreign patents to the Third Party on the same terms and conditions and the First Parties shall not otherwise sell said foreign patents to any other party without first giving the Third Party such option and opportunity to purchase the same on the same terms and conditions so proposed by such other party.

In the event of such a sale of said foreign letters patent, or of any of them, to any such other party or parties, the exclusive license under said foreign letters patent, hereinbefore granted to the Third Party, shall be converted into and thereupon become, and thereafter continue to be only a nonexclusive [37] license in respect to the country or countries of which said foreign letters patent are sold by the First Parties but, with the exception of the nonexclusive character thereof, such nonexclusive license shall continue to be the same, in respect to all the terms and conditions thereof, as the said exclusive license under said foreign patent and such nonexclusive license shall be exercised subject to all the terms and conditions of this agreement.

3. In the event the First Parties grant any rights under said United States letters patent to any other party or parties in respect to the use of said inventions other than in drying food substances, written notice of any such grant or grants and the terms thereof shall be given by the First Parties to the Third Party within ten days after any such grant is made.

4. The First Parties hereby give to the Third Party the option of purchasing, at any time during the life of this agreement, all of said United States letters patent on said inventions, and any foreign letters patent therefor not theretofore sold as above provided, and any and all other United States letters patent and foreign letters patent respectively issued for improvements on said several inventions and on such other inventions adapted for a similar use

and made by the First Parties or by either of them, during the life of this agreement, for the sum of \$150,000.00 payable to the First Parties, share and share alike, at the rate of \$25,000.00 a year with interest on all deferred payments at the rate of 7% per annum from date of payment of the first installment of \$25,000.00 until payment of such deferred installments, it being understood that such total purchase price shall be reduced by the amounts previously received from anyone by the First Parties and also by the fixed total amounts, if any, definitely agreed to be paid to the First Parties on account of the purchase price of said foreign letters patent; or any of them, in the event of such a sale thereof; and it also being understood that any uncertain or contingent amounts, agreed to be paid to the First Parties by anyone on account of the purchase price of said foreign patents, or any of them, shall be assigned and transferred to the Third Party [38] in the event of its said purchase of said United States and foreign letters patent.

In the event the Third Party exercises said option, the First Parties, upon the payment to them of said first installment of \$25,000.00 and the delivery to them of an agreement by the Third Party to purchase said patents and pay the balance of the said purchase price therefor, as above provided, the First Parties thereupon shall execute an assignment of all said United States and foreign letters patent to the Third Party and deposit such assignment with the First Federal Trust Company, at

San Francisco together with proper instructions as to the delivery thereof to the Third Party upon that Party's payment to the First Parties of the balance of said purchase price, together with said interest thereon and within the said times above specified.

At its option, the Third Party may pay the whole of said purchase price at the time of exercising such option, or, at or prior to the time any such installment is due and payable, pay the whole of any balance due on such purchase price, provided that, in addition thereto, it pay to each of said First Parties an amount sufficient to pay that portion of such Party's Income Taxes attributable to such premature payment on such purchase price in excess of the amount of said Income Taxes the said Party would otherwise have had to pay if such purchase price had been paid in said annual installments of \$12,500.00 each to each of said First Parties.

Upon the Third Party's exercise of said option to purchase by the payment of said first installment of \$25,000.00, the payment of royalties by the Third Party to the First Parties, as hereinafter provided, shall cease in respect to all devices sold by the Third Party after the payment of said first installment; provided, however, that if each such successive and additional [39] annual installment of \$25,000.00 together with said interest thereon, is not paid the First Parties within one year after the payment of the First Parties of the preceding annual installment of said sum of \$25,000.00 as above provided, then

the Third Party's option to purchase said United States patents shall forthwith terminate and the First Parties be entitled to the immediate return to them of said assignment of said patents so deposited in escrow and said First Parties shall also retain, for their own use, all sums and installments on said purchase price previously paid them and, in addition to the foregoing, the Third Party shall resume the payment of royalties on all said devices delivered by it after expiration of one year from the last payment by it of any such installment on said purchase price and, in respect to said devices delivered by the Third Party between making its first payment on such purchase price and the date of its default in paying any such subsequent installment, the Third Party, in the event the amounts, so paid on account of the purchase price and forfeited as above provided, are insufficient to pay the royalties on all said devices so delivered during said period, shall forthwith pay to the First Parties an amount which, together with said forfeited payments on the purchase price, shall aggregate the total amount of royalties payable on said devices at the rates hereinafter set forth.

In the event of the completion of said sale of said United States and foreign patents to the Third Party by the delivery to it of said assignment, the First Parties shall, within ten days after such delivery, assign to the Third Party any and all licenses under said United States letters patent issued and granted to other parties by the First Parties within forty days prior to the first payment made by the Third Party on account of such pur-

chase price, together with the right to collect and retain all royalties and moneys payable to the First Parties under the [40] terms of said licenses and accruing and becoming due and payable after such assignment thereof; it being understood and agreed that said sale of said United States letters patent to the Third Party shall be subject to all prior licenses thereunder granted by the First Parties and that such sale of said patents shall not transfer to the Third Party any *bona fide* licenses granted thereunder more than forty (40) days prior to such first payment on account of such purchase price, or any moneys or royalties payable to the First Parties under the terms of and such licenses, title to and ownership of which, together with any moneys and royalties payable thereunder, shall remain vested in the First Parties.

5. The Second Parties hereby sell, assign and transfer to the Third Party the business conducted by the Second Parties under said firm name of "Progressive Evaporator Company" together with the goodwill of said business (but excluding and not including any bills receivable, accounts receivable, bills payable or accounts payable, or other liabilities of date prior to January 1, 1922, all of which shall be collected or paid by the 2d Parties), and all trade-marks, trade names and labels used in connection with said business, together with all contracts, unperformed by them and all their business accrued since January 1, 1922, subject to legitimate liabilities for expense of conducting new business since January 1, 1922, and together with all

plans, drawings advertising matter and stationery used by them in or for said business and the business records, list of present and prospective customers, and necessary correspondence, in relation to said business, together with the right to use, in any manner, the name "Progressive Evaporator Company"; the name "Progressive Evaporator" and the name "Progressive Dehydrator" and the right to register said names, or any of them, as trade marks.

6. The Third Party shall use reasonable efforts and endeavors to promote and constantly increase the business done [41] by it under the terms of this license agreement and, during the life of this license, shall not deal in, make or sell any type of evaporator, dehydrator, or dryer other than those embodying one or more of said inventions or improvements except such as may be taken in trade or such as are made and sold by the Third Party at a net profit to it of 25% or less and subject to the provisions of paragraph 7 hereof, except small evaporators, dehydrators or dryers of less than four truck capacity each, it being agreed no royalties are to be paid on said devices taken in trade, sold at a net profit of less than 25% or of a capacity less than four trucks each and none of which embodying any of said inventions.

7. In the event the First Party devise or invent an evaporator of a capacity of less than four trucks, they shall forthwith disclose same to the Third Party who shall, within sixty days thereafter, notify the First Parties, in writing, whether or not

such Third Party elects to make and sell such type of small evaporator.

If the Third Party elects to make and sell the same, then it shall forthwith cease to and not thereafter make or sell any other type of evaporators of a capacity equal to or greater than the capacity of such small type of evaporator so devised or invented by the First Parties or by either of them, while continuing to make and/or sell such latter type and, on each and all such small evaporators, so devised by the First Parties, or by either of them, and sold by the Third Party, the said Third Party shall pay royalties at the rates hereinafter set forth.

If the Third Party does not so elect to sell such small type of evaporator, so disclosed by the First Parties, or, after commencing to sell the same, ceases to do so, the First Parties may forthwith make and sell the same every where and until the exercise of the option provided for in the next paragraph. [42]

After any such manufacture and sale by the First Parties of such small type of evaporator, the Third Party, during the life of this agreement, shall have the option of exclusively making and sell the same, subject to the payment of said royalties thereon, provided that the Third Party, more than thirty days prior to the expiration of any calendar year during the life hereof, gives the First Parties written notice, that, commencing the first day of the succeeding year, the Third Party desires to thereafter exclusively make and sell such small type of

evaporators; in the event such a notice of the exercise of said option is served, the First Parties shall discontinue the sale of such small type of evaporator after the expiration of the calendar year in which the notice is served and thereafter, for the life of this agreement and subject to all the terms and conditions thereof, the Third Party shall have the exclusive right of making and selling the same.

8. For the purposes of this agreement, the capacity of one truck is understood and deemed to be forty-four 3'x6' or 3'x8' standard field trays or their equal in capacity.

9. By way of royalty, the Third Party shall pay to the First Parties on each and every of said devices, directly or indirectly sold by the Third Party, for use in any country or territory in which applications for said letters patent on any of said inventions have been or may be filed, the following amounts:

a. On each and every such evaporator equipment, made by the Rees Blow Pipe Manufacturing Company, Inc., for the Third Party and sold by such Third Party, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof. [43]

b. On each and every such evaporator equipment not made by said Rees Blow Pipe Manufacturing Company, Inc., and sold directly or indirectly by the Third Party for use in Washington, Oregon or California, \$75.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

c. On each and every evaporator equipment, sold by the Third Party for use other than in Washington, Oregon or California, irrespective by whom the same is manufactured or from whom purchased, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

d. If said Rees Blow Pipe Manufacturing Company, Inc., fails, refuses or neglects to furnish to the Third Party any such evaporator equipment for use in Washington, Oregon or California, within sixty days after an order therefor is duly given and accepted by said company, or in the event any such order for such equipment is not accepted by such company, or if both said First Parties dispose of their respective interests in said Rees Blow Pipe Manufacturing Company, Inc., then said royalties on any such equipment specified in any such order and sold by the Third Party for use in any of said states of Washington, Oregon and California, shall be \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

10. The Third Party shall pay to the First Parties, share and share alike, either at 340 Seventh Street in the city and county of San Francisco, or at such other place or places, in said city as may be designated in a written notice or notices served on the Third Party by either of said First Parties in respect to the payment of such First Party's share of said royalties, the said royalties on each and every of such evaporator equipment within

thirty days after the delivery thereof by the Third Party to the purchaser thereof from the Third Party. [44]

11. At any time during the month of March of each and every calendar year during the life of this agreement, the First Parties, at their joint option, may terminate this agreement and license by serving the Third Party with a written notice to such effect provided the total royalties, paid by the Third Party to the First Parties on all said devices delivered by the Third Party prior to the calendar year in which said notice is served, do not amount to \$4,125.00 or more, on an average, for each and every calendar year prior thereto and subsequent to the execution hereof, but including the calendar year of 1922; upon the service of such notice in such event, this license agreement, and all the terms and provisions thereof, excepting those covenants provided to be kept after the termination of the license hereby granted, shall terminate but without prejudice to the right of the First Parties to collect any unpaid royalties due or accrued at the time of such termination.

12. The Third Party shall keep full, true and accurate books disclosing the business done by it under the terms hereof, and, at all reasonable times, during business hours, the First Parties and their representatives, shall have the right to examine said books and all other documents, bills, receipts, contracts and papers of the Third Party pertaining to said business and to make copies thereof for the purpose of checking any accountings under the

terms hereof and for the adjustment of any controversy, in respect to any such accountings, but the information thus obtained shall be used for no other purpose.

13. The Third Party covenants that any and all letters patent respectively issue on said inventions are and will be good and valid in law in respect to each and all the claims thereof and covenants not to question or attack the validity thereof at any time during the life of this license or after the termination thereof, in the event of such termination prior to the expiration of said letters patent. [45]

14. On each equipment, sold by the Third Party in the United States, and embodying any of said inventions covered by any United States letters patent respectively issued on said applications, there shall be marked the word "Patented" together with the respective dates on such letters patent.

15. In the event of the infringement of the letters patent, or any of them, respectively issued for said inventions and improvements heretofore or hereafter made by the First Parties, or by either of them, the Third Party may request the First Parties to institute and prosecute an infringement suit against the infringer and, with said request, shall furnish the First Parties with a drawing and written description of the infringing device, together with the name and address of the infringer. If any infringement suit shall be brought by the First Parties upon such request, or otherwise, the entire costs and expenses thereof shall be borne by

the First Parties, but if no such infringement suit is brought by the First Parties within ninety days after the service of such written request, against the party named as infringer in such request, the Third Party may at its option commence and prosecute such a suit in the names of the First Parties against such party so named as infringer in such request, and in that event the entire costs and expenses of commencing and prosecuting any such infringement suit, so brought by the Third Party shall be paid by said parties as follows: 75% of such costs and expenses by the First Parties out of the said royalties thereafter paid to them but not otherwise, and 25% thereof by the Third Party; it being understood and agreed, however that, out of the royalties accruing and becoming payable after the commencement of any such suit by the Third Party, in the names of the First Parties, the Third shall be entitled to and, may retain a sum, not exceeding one-half of such royalties, as they accrue, and apply such sum in payment of 75% of such costs and expenses so payable by the First Parties; at any time, the First Parties shall be entitled to take entire control, [46] through their own attorneys, of the prosecution of such a suit commenced by the Third Party in the names of the First Parties.

Within ten days after the commencement of any such infringement suit by the Third Party, said Party shall give the First Parties a written notice setting forth the title of such suit and the court in which brought.

In the event the Third Party fails to keep and perform any of the covenants or conditions herein contained to be kept and performed by it, or in the event of the insolvency of the Third Party, the First Parties shall have the right and option to declare this license agreement *agreement* abrogated and terminated by serving a written notice to that effect on the Third Party and thereupon this license agreement shall become abrogated and terminated and shall cease and come to an end, and all rights hereby granted and the right of practicing said systems or making and selling said devices shall cease and be terminated solely by the service of said notice, without the necessity of any judicial proceeding, order judgment or decree and as fully, completely and as effectually as if there had been a judicial judgment or decree of forfeiture, but such forfeiture shall be without prejudice to the rights of the First Parties to recover any royalties or license fees, or other moneys, that may be unpaid or due and owing, at the time from the Third Party to the First Parties.

17. Upon the termination of this license agreement, prior to the expiration of the respective lives of all said United States letters patent, the Third Party covenants not to make, sell or deal in devices patented in or by any of said United States or foreign letters patent during the remainder of the lives of such letters patent and, in the event of such termination, the First Parties shall thereupon and thereafter be entitled to use, as a trade mark, trade name or otherwise, the word "Progressive" in,

respect to evaporators, dehydrators or dryers. [47]

18. No waiver, by either Party, of any breach of any of the foregoing covenants or conditions by the Other Party, shall be deemed a waiver as to any subsequent and similar breach.

IN WITNESS WHEREOF, the said parties hereto have hereunto set, or caused to be set, their respective names and seals, the day and year first above written.

CLAUDE REES,
CHARLES F. HINE,
First Parties.

CLAUDE REES,
CHARLES F. HINE,
M. A. NEAL,

Second Parties.

PROGRESSIVE EVAPORATOR COM-
PANY, INC.,

By NORMAN LOMBARD,
President.

LORING POWELL,
Secretary.

[Endorsed]: Filed Aug. 8, 1923. [48]

(SUBPOENA AD RESPONDENDUM.)

UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

The President of the United States of America, GREETING: To Claude Rees, Charles F. Hine, M. A. Neal, Rees Blow Pipe Manufacturing Company, Inc., a Corporation, Progressive Evaporator Company, Inc., Edward B. Ward and Malcolm A. Neal, Individually and as Co-partners, Doing Business Under the Firm Name and Style of Progressive Dehydrater Company, Dee Hi Food Products Co., Loring Powell, A. C. St. Marie, John Doe, Mary Doe, Richard Roe and Sadie Green.

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Second Division, aforesaid, at the courtroom in the city of San Francisco, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Norman Lombard, Montgomery Flynn, Wm. T. Eckhoff, Norman Lombard and Ellen Lombard, Trustees for Ellen Lombard, Elizabeth Lombard and Norman Lombard, Junior, who are citizens of the State of California and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court this 8th day of August, in the year of our Lord one thousand nine hundred and twenty-three and of our Independence the 148th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill may be taken *pro confesso*.

[Seal]

WALTER B. MALING,
Clerk,

By J. A. Schaertzer,
Deputy Clerk [49]

(MARSHAL'S RETURN.)

1089.

United States of America,
Northern District of California,—ss.

I HEREBY CERTIFY AND RETURN that I served the within *subpoena ad respondendum*, on the therein named, Rees Blow Pipe Manufacturing Company (Inc.), a corporation, by handing to and leaving a true and attested copy thereof with,

Claude Rees (President of the Rees Blow Pipe Manufacturing Company (Inc.), a corporation), personally at the city and county of San Francisco in said district on the 21st day of August, A. D. 1923.

I HEREBY FURTHER CERTIFY AND RETURN that I served the within *subpoena ad respondendum*, on the therein named, Claude Rees, by handing to and leaving a true and attested copy thereof with Claude Rees, personally at the city and county of San Francisco, in said District on the 21st day of August, A. D. 1923.

I HEREBY FURTHER CERTIFY AND RETURN that I served the within *subpoena ad respondendum*, on the therein named, Charles F. Hine, by handing to and leaving a true and attested copy thereof, with Claude Rees, an adult person and copartner of said Charles F. Hine, at the place of business of said Charles F. Hine, in the city and county of San Francisco, in said District, on the 21st day of August, A. D. 1923.

I HEREBY FURTHER CERTIFY AND RETURN that I served the within *subpoena ad respondendum*, on the therein named Progressive Dehydrater Company, a copartnership, by handing to and leaving a true and attested copy thereof with Malcom A. Neal (a copartner of the Progressive Dehydrater Company, a copartnership), personally at the city and county of San Francisco, in said District, on the 27th day of August, A. D. 1923.

I HEREBY FURTHER CERTIFY AND RETURN that I served the within *subpoena ad respondendum*, on the therein named M. A. Neal, by handing to and leaving a true and attested copy thereof with M. A. Neal, personally at the city and county of San Francisco, in said District, on the 27th day of August, A. D. 1923.

San Francisco, Cal., August 27th, 1923.

J. B. HOLOHAN,
United States Marshal.
By J. W. GROVER,
Deputy.

[Endorsed]: Filed August 27th, 1923. [51]

(Title of Court and Cause.)

ANSWER TO BILL OF COMPLAINT.

Now comes Claude Rees, Charles F. Hine, Rees Blowpipe Manufacturing Company, Inc., a corporation, and Progressive Evaporator Company, Inc., a corporation, and for answer to the bill of complaint on file herein admit, deny and allege as follows:

These defendants admit the allegations of paragraphs I and II of said bill of complaint.

These defendants admit the allegations contained in Paragraph III of said bill of complaint. Concerning the allegations in said Paragraph III, however, these defendants allege that the assignment made by Claude Rees to Rees Blowpipe Manufacturing Company, Inc., of Application Serial No.

351,538 and of the invention, drying equipment and apparatus described therein was made without consideration and solely for the convenience of said Claude Rees and Charles F. Hine, and said Rees Blowpipe Manufacturing Company, Inc., did not thereby acquire any beneficial right or title or interest in or to said invention, drying equipment or apparatus. These defendants further allege that the letters patent numbered 1,413,135, granted, issued and delivered by the Government of the United States to said Rees Blowpipe Manufacturing Company, Inc., on the 18th day of April, 1922, were so received by said Rees Blowpipe Manufacturing Company, Inc., for the use and benefit of said Claude Rees and Charles F. Hine, to whom said Rees Blowpipe Manufacturing Company, Inc., thereafter, and before the commencement of the above-entitled action, duly assigned said letters patent.

These defendants admit the allegations of Paragraph V of said bill of complaint, except as to those specific matters therein which are herein specifically denied. These defendants [52] have no information or belief upon the subject sufficient to enable them to answer the allegations or any allegation contained in Paragraph V of said bill of complaint to the effect that said Lombard is now, and/or ever since the 17th day of April, 1922, has been the owner of one share of the preferred, and/or of two and one-half, or any other number of shares of the common stock of said Progressive Evaporator Company, Inc., and basing their denial upon that ground, these defendants deny that said Lombard is now,

and/or ever since April 17th, 1922, has been the owner of said share of preferred stock and/or of said shares of common stock, or any thereof.

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations contained in that portion of Paragraph V of said bill of complaint, beginning with the word "that" on line 31 of page 7, down to and including the word "Powell" on line 7 of page 8 and basing their denial upon that ground deny each and every of said allegations.

Concerning the allegations of said Paragraph V to the effect that "it had been agreed by and between Norman Lombard, one of the defendants herein, and said Rees, Hine and Neal that twelve hundred fifty (1250) shares of said common stock should go to said Neal, and twelve hundred fifty (1250) shares of said common stock of said corporation should go to Lombard," these defendants allege that under the terms of the offer referred to in Paragraph IV of said bill of complaint, said Rees and Hine were jointly entitled to receive one half of all common stock to be issued by said Progressive Evaporator Company, Inc., in the event that said offer was accepted, and said Rees and Hine thereafter nominated said Norman Lombard as the one to whom their share of said common stock should be issued, in the event that said offer should be accepted, because of certain false and fraudulent representations and promises made by said Norman Lombard concerning his ability to finance said corporation by disposing of its preferred stock. [53]

These defendants admit that the license agreement referred to in Paragraph VI of said bill of complaint constituted the main capital of the Progressive Evaporator Company, Inc. In this behalf, however, these defendants allege that said license agreement was not of exceedingly great value as alleged by plaintiff, but, on the contrary, was practically of no value whatever to said corporation, for the reason that it had no capital or means with which to operate under said license agreement, was in default in the payments to be made by it thereunder, and as a result thereof said license agreement was cancelled by said Claude Rees and Charles F. Hine on or about January 12th, 1923.

Concerning the allegations contained in that portion of Paragraph VI from and including line 15, page 8, to and including line 4, page 9, these defendants allege that at all times after the assignment by said Claude Rees to said Rees Blowpipe Manufacturing Company, Inc., said Claude Rees and Charles F. Hine were the owners of the improvement and invention described in Application No. 351,358 and acted in all respects as though they were the sole owners thereof, and said Rees Blowpipe Manufacturing Company, Inc., did not have or claim any right, title or interest therein. Said Rees Blowpipe Manufacturing Company, Inc., did not notify said Progressive Evaporator Company, Inc., of said assignment or of its alleged interest in and to the improvement and invention covered by said application, for the reason that said Rees Blowpipe Manufacturing Company, Inc., did not then and

there, or at any other time, or at all claim any right or title of interest in or to the improvement or invention described in said application.

These defendants deny that the agreement marked Exhibit "B" was entered into by Rees and Hine, or by either of them, as agents or as agent for and/or representative of Rees Blowpipe Manufacturing Company, Inc., and/or that said Rees Blowpipe Manufacturing Company, Inc., consented to said agreement and/or [54] adopted said agreement and/or the terms and/or conditions, or any term of condition thereof as its own act and/or deed.

These defendants admit the allegations of Paragraph VII of said bill of complaint.

These defendants admit the allegations of Paragraph VIII of said bill of complaint. Concerning the allegations contained in Paragraph VIII, however, these defendants allege that notice of the meeting of said Board of Directors, at which said Lombard and Powell were removed from their offices as president and secretary respectively, was given to each and all of the directors, in the manner required by the by-laws of said corporation, and said Lombard was present at said meeting.

These defendants deny that on the 24th day of October, 1922, a dispute and/or controversy arose by and/or between Lombard and Powell on the one hand and Rees, Hine and Neal on the other with respect to the management and control of the affairs of said corporation. In this behalf, these defendants allege that on or about the 24th day of October, 1922, said defendants Rees, Hine and Neal requested

said Lombard to call a meeting of the Board of Directors of said Progressive Evaporator Company, Inc., which said Lombard then and there refused to do. Said Lombard then and there and at the time he refused to call said meeting knew that one of the purposes sought to be accomplished by said Rees, Hine and Neal at said meeting was the removal of said Lombard as president and of said Powell as secretary of said corporation. Thereupon, in order to hold a meeting of said Board of Directors, it became necessary for said Rees and Hine, under power vested in two directors by the by-laws of said corporation, to call said meeting of said board, and said meeting was thereupon called by them for October 27th, at the hour of 11:00 o'clock A. M., notice thereof being given to each director in the manner required by the by-laws of said [55] corporation. Thereupon, and after said notice of said meeting of said Board of Directors had been given as aforesaid, said Lombard attempted to put into effect a scheme and plan to remove the entire Board of Directors of said corporation and to elect directors in the place and stead of said Rees, Hine and Neal. Pursuant to said scheme and plan, said Lombard, on the night of October 25th, 1922, and after the usual business hours, met with said Powell at the office of said corporation and then and there secretly and surreptitiously caused to be issued certificates purporting to represent thirteen shares of the preferred stock of said corporation to the persons and in the amounts stated in Paragraph IX of said bill of

complaint. Said certificates of stock were then and there issued, without the payment of any consideration whatever to said corporation and in violation of the by-laws thereof, which then and there provided that certificates representing shares of the capital stock of said corporation should be issued only upon order of its Board of Directors. At the same time and place and pursuant to the same plan and scheme, said Lombard with said Powell then and there prepared notice of a meeting of the stockholders of said corporation to be held on November 6th, 1922, for the purpose of considering and acting upon a proposition to remove the entire Board of Directors of said corporation. Said notice of said meeting of stockholders was not mailed, however to said Rees, Hine and Neal, or any of them, until October 26th, 1922, and said notice was not received by them or any of them until October 27th, 1922. Said Lombard in so giving said notice, planned and schemed that when said notice would be received by said Rees, Hine and Neal, it would be too late for them, or any of them, to prevent the removal of said Board of Directors at the meeting of stockholders set for November 6th, 1922, because of the provisions of Section 312 of the Civil Code of the State [56] of California and likewise of the by-laws of said corporation, preventing any stockholder of a corporation from voting his stock unless the same be held by him on the stock-books of the corporation at least ten days prior to the time of such voting.

When said notice of said stockholders' meeting was so received by said Rees, Hine and Neal on October 27th, 1922, they then and there endeavored to locate said Powell, secretary of said corporation, for the purpose of ascertaining what, if anything, had been done by or at the instance of said Lombard with reference to the issuance of new stock of said corporation, said Rees, Hine and Neal being then and there advised by counsel that said Lombard in order to accomplish the removal of the Board of Directors of said corporation would have to own or control two-thirds of the issued and outstanding stock thereof. Said Rees, Hine and Neal were unable to locate said Powell, who at the direction of said Lombard remained absent from the office of said corporation on October 27th, 1922, and continued to remain absent therefrom and also from the city and county of San Francisco continuously until the morning of November 6th, 1922, the date set by said Lombard for the meeting of the stockholders of said corporation at which he planned and schemed to remove the entire Board of Directors thereof. Said Powell was so absent from the office of said corporation and from the city and county of San Francisco during all of said period of time at the direction of said Lombard, and pursuant to said plan and scheme of said Lombard to remove the Board of Directors of said corporation and to prevent said Rees, Hine and Neal or any of them from interfering with such removal; and during all of said period of time from and including October 27th, 1922, to the hour fixed for said stock-

holders' meeting, all of the books of said Progressive Evaporator Company, Inc., were secreted by said Lombard and Powell so that said Rees, Hine and Neal could not obtain any information therefrom. [57]

These defendants deny that on the 25th day of October, 1922, or at any other time, plaintiffs, including Lombard, upon the request of said Lombard, or otherwise, subscribed and/or paid for thirteen or any other shares of the preferred stock of said corporation, and further deny that said corporation received said sum of \$1,300.00, or any part thereof, and/or ever since has had and/or now has the sum of \$1,300.00, or any other sum received by it as consideration for the issuance of said shares of preferred stock or any thereof. In this behalf, these defendants allege that at the time that said Lombard attempted to issue said thirteen shares of said preferred stock, and at the time that he claims to have paid to said Powell the sum of \$1,300.00 therefor, he instructed said Powell not to deposit said moneys, or any part thereof in the bank account of said corporation with the Crocker National Bank of San Francisco, in direct violation of the by-laws of said corporation, which required all funds belonging to said corporation to be forthwith deposited in said bank, and pursuant to said instructions said moneys were not so deposited.

These defendants deny that thereupon and/or for receiving said sum of \$1,300.00, or any other sum, or otherwise, or at all, said corporation issued to said plaintiffs shares of the preferred stock of said

corporation as alleged in Paragraph IX of said bill of complaint.

These defendants deny that each of said plaintiffs, excepting Eckhoff and Flynn, or that any of said plaintiffs, is now and/or ever since October 25th, 1922, has been, or ever was the owner of the shares of stock set opposite their names in Paragraph IX of said bill of complaint, or any of said shares of stock. [58]

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations contained in that portion of Paragraph IX, beginning with the word "The" on line 5 of page 11, to and including the word "Lombard" on line 9 of said page, and basing their denial upon that ground, deny each and every of said allegations.

These defendants deny that on the 27th day of October, 1922, or at any other time, said Norman Lombard gave notice in accordance with Section 310 of the Civil Code of the State of California to the secretary of said corporation to call a meeting of the stockholders thereof on November 6th, 1922, for the purpose of removing the directors of said corporation and electing new directors; and further, deny that thereupon, or at any time, or at all, said secretary gave notice of said meeting according to law or as provided for in the by-laws of said corporation. In this behalf, these defendants allege that notice of said meeting was not given by publication for the period of two weeks, as provided for in Section 310 of the Civil Code of the State of California.

These defendants allege that the meeting of the Board of Directors of said corporation, held on the 1st day of November, 1922, at which said Lombard and Powell were removed as president and secretary respectively of said corporation was not called on or after October 27th, 1922, but was called by directors Rees and Hine on October 25th, 1922, to be held at the office of said corporation on October 27th, 1922, and said meeting was duly and regularly continued from said date until November 1st, 1922, upon which date said Lombard and Powell were removed as officers, as aforesaid.

These defendants deny that on the 27th day of October, 1922, said Neal, Rees and Hine and said Rees Blowpipe Manufacturing Company, Inc., or any of them, with intent to defraud said corporation and its stockholders, and/or with intent to deprive [59] said corporation of its license agreement, and/or with the intention of depriving said Lombard and/or said other plaintiffs of all or any of their interest in and/or to said license agreement, and in and/or to the devices and inventions or any thereof, covered thereby, or at any other time, or otherwise, or at all, entered into an agreement and a conspiracy and scheme, or at all, entered into any agreement or conspiracy or scheme whereby it was agreed that the said Rees, Hine and Neal should obtain and/or secure the control and/or management of said corporation and/or should prevent and/or obstruct the carrying on of the business of said corporation and/or the transaction of sales of drying apparatus and/or equipment by it, and/or

thereafter that the said Rees and Hine, or either of them should prevent and/or attempt to cancel said license agreement on the ground of noncompliance therewith by said corporation, or upon any other ground whatever, and/or that thereafter said Rees and Hine and Rees Blowpipe Manufacturing Company, or any of them, should make a similar license agreement with said Neal and/or Ward, who should operate and/or carry on business thereafter as copartners under the firm name and style of Progressive Dehydrater Company, or otherwise, or at all.

Concerning the allegations of Paragraph X of said complaint, these defendants allege that neither on the 27th day of October, 1922, nor at any other time, did they, or any of them, with said other defendants, or otherwise or at all enter into any agreement or conspiracy, or scheme for the purpose or for any of the purposes alleged in said Paragraph X, or enter into any agreement or conspiracy or scheme for any other purpose, or at all.

These defendants deny that the things or any of the things referred to in Paragraph XI of said bill of complaint were done or accomplished in accordance with the agreement, or scheme or conspiracy alleged in Paragraph X of said complaint, or in accordance with any agreement or scheme or conspiracy whatsoever. [60]

Concerning the allegations of Paragraph XII of said complaint, these defendants allege that after November 1st, 1922, said Neal, Hine and Rees attempted to exercise the control and management of

said corporation, but in every attempt so to do, they were opposed by said Lombard and Powell who, among other things, filed notice with the Crocker National Bank, the banking depository of said corporation, that they and not Neal and Hine were president and secretary respectively of said corporation, and further requiring said bank not to honor checks or drafts drawn by said Neal and Hine as such officers upon said bank account.

These defendants deny that after securing control of said corporation, said Hine, Neal and Rees made no attempt of any kind or character whatsoever to carry on the business of said corporation or to prosecute the sale of the drying apparatus and/or equipment under said license agreement, and/or to carry on its business in any way whatsoever, excepting the collection of money due it and/or the payment of its debts and/or such acts as they deemed necessary and/or expedient for the liquidation of the business of said corporation. In this behalf, these defendants allege that continuously from the first *day November, 1922*, to and including the 12th day of January, 1923, upon which latter date said Rees and Hine cancelled said license agreement in accordance with the terms thereof, said Lombard and Powell did everything within their power to prevent said Hine, Neal and Rees from acting for or on behalf of said corporation and to prevent said corporation from prosecuting any business whatsoever by or through said Hine, Neal and Rees, the only duly appointed and qualified officers thereof.

Concerning the allegations of Paragraph XII, beginning with the word "That" on line 16 of page 14 down to and including the word "corporation" on line 23 of said page, these defendants [63] allege that no business was carried on at the new office of said corporation in the Humboldt Bank Building, that no office force was employed there and no one remained in said office and said office was closed most of the time for the reason that said corporation had no moneys on hand with which to incur any expense whatever; that a horde of creditors were pursuing said corporation and the officers thereof, asking for payment of just obligations due them and for the payment of which said corporation had no present available funds.

Concerning the allegations of Paragraph XIII of said complaint to the effect that Rees Blowpipe Manufacturing Company never rendered to Progressive Evaporator Company, Inc., any statement of the costs of manufacture of plants and rendered bills for the maximum per plant, as provided for in the agreement set forth in Paragraph VII of said bill of complaint, these defendants allege that said Progressive Evaporator Company, Inc., did not at any time request said Rees Blowpipe Manufacturing Company, Inc., to render any statement of the cost of manufacture of said plants and said bills were so rendered for the maximum amount per plant because in each and every instance said maximum amount was the amount to which said Rees

Blowpipe Manufacturing Company, Inc., was entitled, under the terms of said agreement.

These defendants deny that bills for royalties due to defendants Rees and Hine were all or ever rendered on statements of Rees Blowpipe Manufacturing Company, Inc. In this behalf these defendants allege that on several occasions said defendants Rees and Hine, for the purpose of advising said Progressive Evaporator Company, Inc., of the total amount due to both said Rees Blowpipe Manufacturing Company, Inc., for said plants and to said Rees and Hine for said royalties, made a memorandum on statements of said Rees Blowpipe Manufacturing Company, Inc., showing the amount of royalties due to said Rees and Hine; but on each of said occasions said Progressive Evaporator Company, [61] Inc., and said Lombard and Powell fully understood that the account of Rees Blowpipe Manufacturing Company, Inc., for plants and the account of Rees and Hine for royalties were separate and distinct.

These defendants deny that from time to time, or at any time, said Progressive Evaporator Company, Inc., paid a certain sum of money to defendants Rees and Hine and Rees Blowpipe Manufacturing Company, Inc., on said statements rendered and/or on account of the amounts shown due thereon, without specifying to what particular items said amounts were to be applied and/or with the understanding that any payment on account of said statements as rendered was not to be considered as an admission by the Progressive Evaporator

Company, Inc., that the Rees Blowpipe Manufacturing Company, Inc., was entitled to the maximum amount for each of said plants as provided for in said agreement set out in Paragraph VII and/or also were not to be considered as a waiver by the Progressive Evaporator Company, Inc., of its rights for an accounting from the Rees Blowpipe Manufacturing Company, Inc., of the cost of manufacture of each and every one of said plants. On the contrary, these defendants allege that each and all of said payments made by said Progressive Evaporator Company, Inc., were so made to said Rees Blowpipe Manufacturing Company, Inc., on account of the moneys due to it for manufacturing plants and none of said sums, or any part thereof, was ever paid by said Progressive Evaporator Company, Inc., to said Rees and Hine, or either of them, for or on account of royalties due them. Said amounts so paid were immediately upon such payments being made applied by said Rees Blowpipe Manufacturing Company, Inc., upon its books as payments on account of the moneys due to it for plants, as aforesaid, and the amounts due to it for said plants at all of said times exceeded the amounts paid by said Progressive Evaporator Company, Inc. In this behalf, [62] these defendants further allege that the statements rendered from time to time by Rees Blowpipe Manufacturing Company, Inc., to said Progressive Evaporator Company, Inc., purporting to show the amounts due to it for plants manufactured for said Progressive Evaporator Company, Inc., correctly showed the amounts to which it was

entitled under the terms of its agreement with said Progressive Evaporator Company, Inc., and there was no understanding at the time that any moneys were paid on account thereof, other than the understanding that said moneys were being then and there paid on account of the moneys due to Rees Blowpipe Manufacturing Company for plants manufactured by it.

These defendants deny that Progressive Evaporator Company, Inc., ever gave to Rees and Hine, or either of them, or that Rees and Hine received or accepted from it collateral security or any security for any balance or any account remaining unpaid to them as royalties under their agreement with said Progressive Evaporator Company, Inc. In this behalf, these defendants allege that no moneys have ever been paid to them or either of them or to the Rees Blowpipe Manufacturing Company, Inc., for them or either of them, for or on account of royalties; and further allege that neither said Rees nor Hine has ever received or accepted, nor has said Rees Blowpipe Manufacturing Company, Inc., for them or either of them, ever received or accepted any collateral or other security from said Progressive Evaporator Company, Inc., for moneys due to said Rees and Hine for or on account of said royalties.

These defendants deny that said Rees and Hine never, at any time advised said Progressive Evaporator Company, Inc., that they were not accepting the money paid on account of the royalties due but were treating the royalties account as unpaid and

in default. In this behalf, these defendants allege that on numerous occasions, up to and including October 25th, 1922, [64] said Rees Blowpipe Manufacturing Company, Inc., rendered statements to said Progressive Evaporator Company, Inc., and to said Lombard and Powell as president and secretary respectively thereof, showing that each and all of the payments made by said Progressive Evaporator Company, Inc., to said Rees Blowpipe Manufacturing Company, Inc., had been applied by the latter on account of the amounts due to it for plants manufactured for said Progressive Evaporator Company, Inc., and that no part of said payments, or any thereof had ever been applied to any other account whatever; and during said period of time, said Rees and Hine personally notified said Lombard and Powell on numerous occasions of the amounts due to them for royalties and demanded payment of said amounts and on none of said occasions was anything ever said by said Lombard and Powell, or either of them, to the effect that any payments had been made on account of said royalties, or to the effect that any of the statements rendered by the Rees Blowpipe Manufacturing Company, Inc., showing the application of payments made by said Progressive Evaporator Company, Inc., to it were incorrect.

Concerning the allegations of Paragraph XIII of said complaint, these defendants allege that said Lombard and Powell knew during all of the time that they were officers of the Progressive Company, Inc., that no moneys had ever been paid by the latter

to Rees and Hine for or on account of royalties due them, and also knew that all moneys paid to Rees Blowpipe Manufacturing Company, Inc., by said Progressive Evaporator Company, Inc., had been applied by said Rees Blowpipe Manufacturing Company, Inc., as payments on account of the amounts due for plants manufactured, and furthermore, that such payments were at all times less than the amounts so due to said Rees Blowpipe Manufacturing Company, Inc., for plants at the times said payments were made. [65]

These defendants deny that on the 13th day of January, 1923, at a pretended meeting of the directors of said corporation at which Hine, Neal and Rees only were present, and/or of which meeting said Lombard and Powell had no actual notice, in pursuance of said fraudulent agreement and/or scheme and/or conspiracy, the said Rees and Hine pretended to give to said Neal as president of said corporation a notice of the cancellation of said license agreement, and/or attempted and/or pretended to cancel said license agreement on account of the failure of said corporation to pay said royalties to them, and/or said Neal, as president of said corporation, pretended to accept, on behalf of said corporation, the said notice of cancellation. These defendants further deny that the said notice of cancellation given by said Rees and Hine, and/or the alleged pretended cancellation by them was a sham and/or fraud and/or made with intent to defraud said corporation as aforesaid, and/or in

pursuance of said or any fraudulent agreement and/or scheme and/or conspiracy.

Concerning the allegations of Paragraph XIV of said complaint, these defendants allege that on the 12th day of January, 1923, and before the meeting of the Board of Directors of the Progressive Evaporator Company, Inc., referred to in Paragraph XIV of said bill of complaint, said defendants, Rees and Hine, in their individual capacity served notice upon said Neal, as president of said corporation, that they had elected to and had in fact cancelled the license agreement referred to in said Paragraph XIV for and by reason of the failure of said corporation to pay royalties as in said license agreement provided, and because of the default of said corporation in performing the obligations upon its part to be performed under said license agreement. At said meeting of said Board of Directors on the 13th day of January, 1923, which meeting was duly and regularly held, and of which meeting said Lombard and [66] said Powell had due notice, said Neal announced that he had been served with said notice of cancellation, but at said meeting no action whatever was taken upon or concerning said notice. Said Hine, as secretary of said corporation, caused the minutes of said meeting to show and said minutes ever since have shown that said Neal announced at said meeting that he had received said written notice of cancellation from said Rees and Hine. Said corporation was at the time that said notice of cancellation was so given in default in the payment of royalties as in said license agreement

provided, and said Rees and Hine then and there had the right to cancel said license agreement because of such default.

These defendants deny that previous to the formation of said copartnership, defendants, Rees, Hine and Rees Blowpipe Manufacturing Company, Inc., entered into a license agreement with said Neal and Ward similar to the license agreement executed and delivered by them to said Progressive Evaporator Company, Inc. In this behalf, these defendants allege that said Rees Blowpipe Manufacturing Company, Inc., never, at any time, entered into a license agreement with said Neal and Ward, or anyone else, and further allege that on or about the 14th day of February, 1923, said Rees and Hine entered into a license agreement with said Neal and Ward similar to the license agreement executed and delivered by them to said Progressive Evaporator Company, Inc., which latter agreement is referred to in plaintiffs' bill of complaint.

These defendants deny that thereafter, said Neal, Rees and Hine, or any of them, neglected entirely, or otherwise, or at all neglected the business of said Progressive Evaporator Company, Inc., and/or disregarded and/or ignored its rights in all or any particulars and/or in violation and/or infringement of the patent rights and/or of the letters patent covered by said license agreement said Rees and Hine and/or Rees Blowpipe Manufacturing [67] Company, Inc., and/or said defendants, Neal and Ward, individually and/or as copartners have manufactured and/or sold and/or are now manufacturing

or selling said patented devices and/or that said defendants Rees, Hine and Neal, or any of them, ever since January 13th, 1923, in pursuance of said fraudulent conspiracy and/or scheme and/or at any other time or at all, have infringed and/or violated said rights secured by said patents above referred to, and/or the interests of said Progressive Evaporator Company, Inc., to said patent rights created by said license agreement.

These defendants deny that in order to prevent the carrying out of said conspiracy and/or the divesting of said corporation of its license agreement, said Lombard resisted the attempt of said defendants, Rees, Neal and Hine to remove him as President of said corporation and/or individually and/or as trustee purchased the additional shares of stock, or any thereof, which he was enjoined from voting as aforesaid, and/or attempted by all legal means, or by any legal means to prevent defendants, Rees, Neal and Hine, or any of them, from securing the control of said corporation and/or from stopping the prosecution of its business and/or from bringing about the attempted cancellation of said license agreement as aforesaid, and/or its dissolution. On the contrary, these defendants allege that on and prior to the 25th day of October, 1922, said Rees, Hine and Neal were the owners and holders of a majority of the outstanding capital stock of said Progressive Evaporator Company, Inc., and constituted a majority of the Board of Directors of said corporation, and by reason thereof were in control of and possessed the means and power of controlling said

Progressive Evaporator Company, Inc., and its affairs, and the plan and scheme upon the part of said Lombard and Powell, hereinabove referred to, were formulated by said Lombard for the purpose of preventing said Rees, Hine and Neal from so controlling the business and affairs of said Progressive Evaporator Company, Inc. [68]

These defendants deny that up to October 27th, 1922, said corporation had performed all the terms and conditions required of it to be performed by the terms of said license agreement, and/or that thereafter the failure on its part to perform any of the terms thereof in any respect whatsoever was prevented by the acts or any act of defendants, Rees, Hine and Neal and the Rees Blowpipe Manufacturing Company, Inc., or by any of said defendants.

These defendants deny that if the defendants, or any of them, are allowed to continue the manufacture and/or sale of said devices or of any of said devices and/or the infringement of said patent and patent rights, or any thereof, the said corporation and stockholders will be irreparably injured, and/or instead of having the exclusive rights granted to it by said license agreement, said corporation will be obliged to compete with said defendants at a time when it is under the control and/or dominion of three of said defendants, and/or will consequently be unable to prosecute or carry on any business whatsoever, to its irreparable loss and/or injury.

Concerning said allegations of Paragraph XVIII of said bill of complaint, these defendants allege

that the license agreement between said Rees and Hine and said Progressive Evaporator Company, Inc., was duly cancelled and terminated on the 12th day of January, 1923, in strict accordance with the terms thereof, and because of the default of said Progressive Company, Inc., in the performance of its obligations thereunder, and ever since said date, said Progressive Evaporator Company, Inc., has had no license agreement whatever with said Rees and Hine, or either of them.

These defendants deny that the defendants, Dee Hi Food Products Company and A. C. St. Marie, or either of them, as alleged in Paragraph XVIII of said complaint, or otherwise, or at all, have assisted, and/or are now assisting, and/or aiding and/or abetting defendants Rees, Hine, Neal, Ward and Rees Blowpipe Manufacturing Company, Inc., or any of them, in the manufacture and/or sale of said devices, and/or drying systems, [69] and/or equipment, in the infringement of said patent and/or patent rights, or any thereof.

These defendants deny that the acts and doings, or any act or doing of said defendants, or any of them, are contrary to equity, and/or good conscience, and/or manifestly wrong and injurious or otherwise, wrong or injurious to plaintiffs, or any of plaintiffs, or to the Progressive Evaporator Company, Inc., or are otherwise or at all wrong or injurious.

These defendants deny that the defendants, or any of them, threaten and/or declare that they, or any of them, will continue to infringe upon said

patent and/or patent rights or any thereof. In this behalf these defendants allege that none of said defendants are now or ever have infringed upon any rights of plaintiff in or to the devices, drying systems and equipment or any thereof, referred to in the bill of complaint.

These defendants deny that by reason of the premises and/or alleged threats, and/or alleged unlawful acts, or any thereof of defendants, or any of them, plaintiffs, or any of said plaintiffs, and/or the Progressive Evaporator Company, Inc., have suffered great and/or irreparable, or any injury or damage whatever. These defendants further deny that they, or any of them, have realized large gains, profits and advantages, or any gain, profit or advantage from or by reason of the infringement alleged in plaintiffs' bill of complaint.

These defendants deny that the amount and/or value of the property and/or rights, or any thereof, in controversy in this action, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

WHEREFORE these defendants pray that plaintiffs take nothing by their said action, and that defendants have judgment against said plaintiffs for their costs of suit, and for such other, further and additional relief as to the Court may seem meet and proper.

Dated: December 5th, 1924.

SULLIVAN SULLIVAN & THEO. J.
ROCHE,

Attorneys for Plaintiffs. [70]

State of California,
City and County of San Francisco,—ss.

Charles F. Hine, being duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer to bill of complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

CHARLES F. HINE.

Subscribed and sworn to before me this 10th day of December, 1924.

[Seal]

J. D. BROWN,

Notary Public, in and for the City and County of
San Francisco, State of California.

Receipt of copy hereof admitted this 5th day of
December, 1924.

KEYES & ERSKINE,

Attys. for Pltfs.

[Endorsed]: Filed December 10th, 1924. [71]

(Title of Court and Cause.)

ORDER RE TAKING BILL OF COMPLAINT
PRO CONFESSO.

In this cause the defendants Malcolm A. Neal and Progressive Dehydrator Company, a copartnership consisting of Edward B. Ward and Malcolm

A. Neal, having been regularly served with process as appears from the record and papers on file herein, and having failed to appear and answer plaintiffs' bill of complaint; within the time allowed by the Rules, and the time for appearing and answering having expired;

Now, upon application of Keys and Erskine, attorneys for plaintiffs, it is hereby ordered that the bill of complaint herein be and the same is hereby taken *pro confesso* against Malcolm A. Neal and Progressive Dehydrator Company, a copartnership consisting of Edward B. Ward and Malcolm A. Neal.

Entered July 20th, 1926.

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk. [72]

[Title of Court and Cause.]

(MEMORANDUM OPINION.)

This is the usual stockholders' suit. Although the evidence required, or took (which is quite a different thing) three days to present, the essential facts are remarkably few and free from real conflict, and the applicable law is settled and clear. Free from conflict, because a witness' own conflicting statements present no conflict with the testimony of an opposing witness in so far as is any agreement between them.

Tried in July, the case well might have been decided forthwith, but time for briefs was secured, the last of which was filed in November. In consequence much of the extensive details have escaped memory (praise be), and will not appear herein.

Neither time permits nor duty requires a busy court, at a time long subsequent to trial, to laboriously peruse the testimony and winnow exhibits, to recover details—to virtually retry the case, nor can delay for briefs impose that obligation upon any court.

Generally and briefly, in February, 1922, defendants Rees and Hine owned certain patent rights, all the stock of the defendant Rees corporation and half the common stock of the defendant Progressive corporation; and plaintiff Lombard owned half the said stock of the corporation last aforesaid. Five shares of preferred stock of the latter corporation issued to qualify the board of directors—Rees, Hine, defendant Neal, [73] Lombard and one Powell, & Lombard was president and Powell, secretary. Thereupon contracts were made by which Rees and Hine to the Progressive corporation granted an exclusive license to manufacture and market the evaporating plants of the patent, upon royalties periodically payable within 30 days after delivery of any plant to a purchaser, with provision for forfeiture upon notice in case of default; and the Rees corporation undertook to manufacture some of the plants for the Progressive corporation, for cost price, plus.

About this time Rees and Hine assigned the patent for the plants to the Rees corporation. The enterprise proceeded and to November, 1922, twenty-four plants had been made, sold and delivered to purchasers, at prices aggregating about \$100,000. In the meantime the Rees corporation presented bills, some of which included dues for royalties as well as for dues for manufacturing, a general balance for all, credits for general payments on account, and a net balance thereof.

In October, however, the bills were changed to segregate royalties from manufacturing, no credits were applied to the former, and all thereof from the beginning appeared therein unpaid. None the less, in cash and purchaser's notes in payment or security, about all due the Rees corporation on both accounts had been received by it from the Progressive corporation; and thereof Rees and Hine had received about \$4,000 and more than half of the total of and for royalties. About this time Rees, Hine and Neal agreed to oust Lombard and Powell from the presidency and secretaryship, intending if serious controversy followed, to declare the license forfeited for default in payment of all royalties, and to grant a like license to Neal and defendant Ward. Lombard issued stock to himself and other plaintiffs in [74] *in* endeavor to retain control, and Rees and Hine issued stock so that they might secure control. The result was removal of Lombard and Powell. Neal and Hine succeeding them and litigation between these two factions, with Rees, Hine and Neal the victors so far as is con-

cerned the aforesaid change in officers. January 12, 1923, Rees and Hine notified Neal that the license to the Progressive corporation was cancelled. Thereafter, no meeting of the Progressive corporation save on Jan. 13, 1923, at which said notice was made known by Neal, has been held, and in February, 1923, Rees and Hine to Neal and Ward granted a license like to that to the Progressive corporation. Thenceforward, plants of the patent by the licensees or licensors or both have been manufactured and sold.

It is very obvious that plaintiffs are entitled to recover as they pray. The royalties were due to the Rees corporation, whether it held the patent for itself or as trustee for Rees and Hine.

Its bills for royalties and manufacturing consolidated payments generally applied are evidence of payments applied *pro rata* to both as the law requires where one account is in trust.

Moreover, a greater proportion, \$4,000 at least, was actually paid on royalties to Rees and Hine. The attempt to revoke this application without consent is nugatory and the bills of October indicating it in the circumstances are insufficient to manifest acquiescence by the Progressive corporation. In any event, by conduct forfeitures had so far been waived, that analogous to rents, it could not be invoked save by demand and notice of that intent, which were not made or given. [75]

Again analogous to rents, a demand for more than the exact amount due as a basis for forfeiture or

notice of forfeiture for default of more, is excessive, without right, and futile.

And as royalties accrued to the Rees corporation, it was the right to invoke forfeiture, so that notice of forfeiture by Rees and Hine goes for nothing. In brief, no forfeiture was effected and the attempt to invoke it fails. Furthermore, the acts of Rees, Hine and Neal are breaches of their duty to the Progressive corporation, and betrayal of their official trust to it. They sacrificed the corporation's interests to serve their private interests.

As the governing board, their duty was to see payments made to avoid forfeiture of the license which was the only reason for the Progressive corporation's existence. And as in the circumstances, all payments made were for the benefit of Rees and Hine, however applied, since all went into their pockets, they were bound in duty to Progressive corporation to deposit a sufficient part in their royalties pocket and not all in their manufacturing pocket. Thus they could have fully performed their duty to the Progressive corporation without the diversion of a dollar from themselves. In any, if any, of Lombard's delinquencies, is no justification or excuse to these defaulting trustees.

Directors of a corporation must direct, protect its interests, and in no event postpone the latter to their individual interests. If they undertake to contract for the corporation with themselves, the utmost good faith, fairness, honest judgment and legitimate purpose is exacted of them, and when [76] challenged, theirs is the burden to prove they

have measured up to this high standard. Common honesty, sound morality, and just business policy can be satisfied with nothing less. See Geddes Case, 254 U. S. 590 and its citations.

In all this, defendants have failed. A temporary decree for an accounting of profits and damages, before a Master, will be entered.

BOURQUIN, J.

[Endorsed]: Filed November 22, 1926. [77]

In the Southern Division of the United *States Court*
in and for the Northern District of California,
Second Division.

IN EQUITY—No. 1089.

NORMAN LOMBARD, MONTGOMERY
FLYNN, WM. T. ECKHOFF, NORMAN
LOMBARD and ELLEN LOMBARD, Trus-
tees for ELLEN LOMBARD, ELIZABETH
LOMBARD and NORMAN LOMBARD,
Junior,

Plaintiffs,

vs.

CLAUDE REES, CHARLES F. HINE, M. A.
NEAL, REES BLOW PIPE MANUFAC-
TURING COMPANY, INC., a Corporation,
PROGRESSIVE EVAPORATOR COM-
PANY, INC., EDWARD B. WARD and
MALCOLM A. NEAL, Individually and as
Copartners, Doing Business Under the Firm

Name and Style of PROGRESSIVE DEHYDRATER COMPANY, DEE HILL FOOD PRODUCTS CO., LORING POWELL, A. C. ST. MARIE, JOHN DOE, MARY DOE, RICHARD ROE and SADIE GREEN,

Defendants.

INTERLOCUTORY DECREE.

This cause having heretofore come on regularly to be heard before the Court upon the pleadings and proofs, documentary and oral, taken and submitted in the case and being of record therein, and the cause having been duly argued and submitted to the Court for its consideration and decision, and the Court being fully advised in the premises it is **ORDERED, ADJUDGED AND DECREED:**

(1) That United States Letters Patent No. 1,413,135 issued April 18, 1922, to Rees Blow Pipe Manufacturing Company, Inc., of Claude Rees being the letters patent referred to in the bill of complaint, are good and valid in law and that the patent invention is of great practical utility and benefit.

(2) That the said Claude Rees was the first original and true inventor of the drying equipment and drying apparatus [78] described and claimed in the said letters patent and in the following applications to the United States Government for letters patent, to wit:

Application Serial No. 429,298 filed December 9 1920.

Application Serial No. 408,703 filed September 7, 1920.

(3) That prior to the commencement of this action the Progressive Evaporator Company, Inc., a corporation organized and existing under the laws of the State of California, became vested with the exclusive right of manufacture and sale of the drying equipment and apparatus and devices embodying the invention and improvements contained in and covered by said letters patent and in said applications for patents throughout the United States and the territories and territorial possessions thereof for the use in drying food substances including fruits and vegetables.

(4) That the Progressive Evaporator Company, Inc., is now and ever since the 10th day of February, 1922, has been the owner and holder of the license agreement, a copy of which marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof for all purposes; that the Progressive Evaporator Company, Inc., is now and ever since the 10th day of February, 1922, has been the owner of all the rights, benefits and privileges created by the said agreement.

(5) That the attempted cancellation of the said agreement by the defendants Claude Rees and Charles F. Hine was invalid, void and of no effect.

(6) That the defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., a corporation organized [79] and existing under the laws of the State of California, M. A. Neal, individually and as a copartner in the Progres-

sive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company have infringed upon the said letters patent and upon the exclusive rights and privileges of the Progressive Evaporator Company, Inc., under the same and under the said license agreement above referred to.

(7) That such infringement continued after full and due notice of the Progressive Evaporator Company, Inc.'s, rights as charged in said bill of complaint.

(8) That since the 13th day of January, 1922, the said defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company have infringed and violated the rights secured to the said Progressive Evaporator Company, Inc., by said agreement and the rights and interests of the said Progressive Evaporator Company, Inc., created by said license agreement.

And it is further ORDERED, ADJUDGED AND DECREED:

(1) That the defendants, Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company, and each of them and their officers, agents, servants, attorneys, workmen and employees and each of them be and they are and each

of them is hereby enjoined and restrained until the further order of this Court from making, or selling or causing to [80] be made, or sold any device or apparatus embodying or containing the inventions described and claimed in and by said letters patent and in and by said applications for letters patent for use in the drying of food substances and in the drying of eatable fruits and vegetables and from infringing upon and contributing to the infringement of said patent directly or indirectly and that a writ of injunction issue out of and under the seal of this court commanding and enjoining said defendants, Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal, individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company, their officers, agents, servants, attorneys, workmen and employees, and each of them, as foresaid.

(2) That the Progressive Evaporator Company, Inc., have and recover from the said defendants, Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal, individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company, the profits which the last mentioned five defendants have realized and/or the damage which the Progressive Evaporator Company, Inc., has sustained from and by reason of the infringement aforesaid and from and by reason of the attempted cancellation by said five defendants of the said license

agreement and by reason of the subsequent violation by the said five defendants of the said license agreement, as aforesaid, and for the purpose of ascertaining and stating the amount [81] of said profits and damages this cause is hereby referred to A. B. Kreft as Special Master *pro hac vice* to ascertain, take, state and report to this Court an account of all the profits received, realized or accrued by, or to the defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal, individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as a copartner in the Progressive Dehydrater Company, and to assess all the damages suffered by the Progressive Evaporator Company, Inc., from and by reason of the infringement aforesaid; that on said accounting the plaintiffs have the right to cause an examination of the respective officers, agents, servants, workmen and employees, and each of them *ore. tenus*, and also be entitled to the production of the books, vouchers, documents and records of the said defendants, their officers, agents, servants, workmen and employees, and each of them in connection with the accounting; that said defendants, Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal, individually and as a copartner in the Progressive Dehydrater Company, and Edward B. Ward as copartner in the Progressive Dehydrater Company, their officers, agents, servants, workmen and employees, and each of them, attend for such purposes

before the Master from time to time as the Master shall direct.

And it is further ORDERED, ADJUDGED AND DECREED, that this Court reserves the right to modify, alter or withdraw the restraining order and injunction hereinbefore provided for, and upon the coming in of said Master's report to enter judgment for the amount, if any, found due from the defendants or any of [82] them according to the report as finally confirmed or for an amount in excess of the amount found due by said report but not exceeding three times the amount found due by said report, and this Court also reserves the right upon the coming in of said report to determine the attorneys' fees, if any, to which the plaintiffs are entitled, to enter judgment in favor of the plaintiffs for their costs and disbursements in this action including a reasonable attorneys' fee and to make such other and further orders in this action and in the premises as to this Court may seem necessary and proper.

BOURQUIN,

United States District Judge.

Dated: December 13, 1926. [83]

EXHIBIT "A."

THIS AGREEMENT, made and entered into this 10th day of February, 1922, by and between CLAUDE REES and CHARLES F. HINE, hereinafter designated the First Parties, and CLAUDE REES, CHARLES F. HINE and M. A. NEAL, copartners doing business under the firm name of

PROGRESSIVE EVAPORATOR COMPANY, hereinafter designated the Second Parties, and PROGRESSIVE EVAPORATOR COMPANY, INC., a corporation organized and existing under the laws of the State of California, hereinafter designated the Third Party,

WITNESSETH:

WHEREAS, the First Parties are the sole and exclusive owners of various and sundry inventions respectively relating to "Drying Apparatus" and to "Systems for Drying Substances," and also of the following various and sundry applications for letters patent of the United States and foreign countries for said inventions, and of the following letters patent of the United States and foreign countries for said inventions, and of the following letters patent of Mexico thereon, to wit:

Application Serial No. 351,538, filed January 15, 1920, for letters patent of the United States for Drying Apparatus;

Application Serial No. 253,230, filed April 11, 1921, for letters patent of Canada for Drying Apparatus;

Application Serial No. 110, filed January 13, 1921, for letters patent of Australia for Drying Apparatus;

Application Serial No. 429,298, filed December 9, 1920, for letters patent of the United States for System for Drying Substances; [84]

Application Serial No. 253,292, filed April 12, 1921, for letters patent of Canada for System for Drying Substances;

Application No. 45,788, filed May 2, 1921, for letters patent of New Zealand for System for Drying Substances;

Application No. 6,859, filed April 12, 1921, for letters patent of India, for System for Drying Substances;

Application No. 142,690, filed March 31, 1921, for letters patent of France for System for Drying Substances;

Application for letters patent of Chile, filed May 19, 1921, for System for Drying Substances;

Application No. 19,143, filed April 8, 1921, for letters patent of Holland for System for Drying Substances;

Application Serial No. 408,703, filed September 7, 1920, for letters patent of the United States for Radiator for Drying Apparatus; and

Letters patent of Mexico, No. 20,203, issued April 21, 1921, for System for Drying Substances; and

WHEREAS, the Second Parties, under said firm name of Progressive Evaporator Company, have been and now are engaged in the business of manufacturing and selling devices embodying the said inventions, or some of them; and

WHEREAS, the Third Party desires to secure a license in respect to said inventions, together with the option of purchasing all said letters patent which have been, or may be hereafter, respectively issued thereon and, also, desires to purchase said business of the Second Parties, together with the goodwill thereof,

NOW, THEREFORE, in consideration of One Dollar (\$1.00) and other valuable consideration, received by the First Parties and the Second Parties from the Third Party, and in consideration of the mutual covenants of said parties as hereinafter set forth; it is covenanted and agreed by and between said [85] parties as follows:

1. The First Parties hereby grant to the Third Party for the respective lives of any United States and foreign letters patent respectively issued for said inventions, unless this license agreement be sooner terminated as hereinafter provided, the exclusive right and privilege, throughout the United States of America and the territories and territorial possessions thereof, and throughout the foreign countries in which said letters patent thereon are applied for and/or issued or granted to the First Parties, or making and selling, for use in drying food substances, but for no other use, devices embodying said inventions, or any of them, respectively disclosed in said pending application and in said letters patent of Mexico, and/or embodying any or all of the improvements embodying said inventions, or any of them, plus some modifications thereof and/or addition thereto and which improvements were heretofore or may be hereafter, during the life of this agreement, made by the First Parties or by either of them, and also, for such use, but for no other use, devices, in the said use of which, said inventions and/or said improvements thereon are practiced, and also of making and selling for use in drying edible fruits and vegetables, but for

no other use, devices embodying any or all other inventions, adopted for such specific use for drying fruits and/or vegetables, and made heretofore or during the life of this agreement by said First Parties, or by either of them, and also devices, in the use of which for drying edible fruits and/or vegetables, said other inventions are practiced; it being understood and agreed that the First Parties reserve to themselves [86] all rights in respect to said inventions, respectively disclosed in said pending applications and Mexican letters patent, and in respect to said specific character of improvements thereon, excepting the rights hereby granted to the Third Party in respect to the exclusive practice of said inventions and/or improvements in the drying of food substances; and that the First Parties also and further reserve to themselves all rights in respect to such other inventions (not disclosed in said pending applications and Mexican letters patent and not constituting such specific character of improvements on the inventions respectively disclosed in such pending applications and Mexican letters patent), excepting the rights hereby granted to the Third Party in respect to the exclusive practice of such other inventions in the drying of edible fruit and/or vegetables.

2. In the event that, at any time during the life of this agreement, the First Parties receive a *bona fide* offer for the purchase of all or of any of said foreign letters patent (subject to the nonexclusive license thereunder to the Third Party as hereinafter provided for), the First Parties shall, in respect

to any such proposed sale of said patents, provide for the deposit, by the proposed purchaser thereof, in escrow of the total amount to be paid on the purchase price therefor within one year thereafter, together with a copy of the agreement containing the terms and conditions of said proposed sale, which shall be subject to the option hereby granted the Third Party of purchasing said patents on similar terms, and, within twenty days after the deposit of said sum, the First Parties shall give the Third Party written notice of the terms and conditions of [87] such proposed sale, and, in the event the Third Party, at any time within sixty days after receiving said notice, complies with all the terms and conditions of such proposed sale to such proposed purchaser, the First Parties shall, thereupon, sell said foreign patents to the Third Party on the same terms and conditions; and the First Parties shall not otherwise sell said foreign patents to any other party without first giving the Third Party such option and opportunity to purchase the same on the same terms and conditions so proposed by such other party.

In the event of such a sale of said foreign letters patent, or of any of them, to any such other party or parties, the said exclusive license under said foreign letters patent, hereinbefore granted to the Third Party, shall be converted into and thereupon become, and thereafter continue to be only nonexclusive license in respect to the country or countries of which said foreign letters patent are sold by the First Parties but, with the exception of the

nonexclusive character thereof, such nonexclusive license shall continue to be the same, in respect to all the terms and conditions thereof, as the said exclusive license under said foreign letters patent and such nonexclusive license shall be exercised subject to all the terms and conditions of this agreement.

3. In the event the First Parties grant any rights under said United States letters patent to any other party or parties in respect to the use of said inventions other than in drying food substances, written notice of any such grant or grants and the terms thereof shall be given by the First Parties to the Third Party within ten days after any such grant is made. [88]

4. The First Parties hereby give to the Third Party the option of purchasing, at any time during the life of this agreement, all of said United States letters patent on said inventions, and any foreign letters patent therefor not theretofore sold as above provided, and any and all other United States letters patent and foreign letters patent respectively issued for improvements on said several inventions and on such other inventions adapted for a similar use and made by the First Parties, or by either of them, during the life of this agreement, for the sum of \$150,000.00 payable to the First Parties, share and share alike, at the rate of \$25,000.00 a year with interest on all deferred payments at the rate of 7% per annum from date of payment of the first installment of \$25,000.00 until payment of such deferred installments, it being understood that such total purchase price shall be reduced by the amounts

previously received from anyone by the First Parties and also by the fixed total amounts, if any definitely agreed to be paid to the First Parties on account of the purchase price of said foreign letters patent; or any of them, in the event of such a sale thereof; and it also being understood that any uncertain or contingent amounts agreed to be paid to the First Parties by anyone on account of the purchase price of said foreign patents, or any of them, shall be assigned and transferred to the Third Party in the event of its said purchase of said United States and foreign letters patent.

In the event the Third Party exercises said option, the First Parties, upon the payment to them of said first installment of \$25,000.00 and the delivery to them of and agreement by the Third Party to purchase said patents and pay [89] the balance of the said purchase price therefor, as above provided, the first parties thereupon shall execute an assignment of all said United States and foreign letters patent to the Third Party and deposit such assignment with the First Federal Trust Company at San Francisco, together with proper instructions as to the delivery thereof to the Third Party upon that Party's payment to the first Parties of the balance of said purchase price, together with said interest thereon and within the said times above specified.

At its option, the Third Party may pay the whole of said purchase price at the time of exercising such option, or, at or prior to the time any such installment is due and payable, pay the whole of any bal-

ance due on such purchase price, provided that, in addition thereto, it pay to each of said First Parties an amount sufficient to pay that portion of such Party's Income Taxes attributable to such premature payment on such purchase price in excess of the amount of said Income Taxes the said Party would otherwise have had to pay if such purchase price had been paid in said annual installments of \$12,500.00 each to each of said First Parties.

Upon the Third Party's exercise of said option to purchase by the payment of said first installment of \$25,000.00, the payment of royalties by the Third Party to the First Parties, as hereinafter provided, shall cease in respect to all devices sold by the Third Party after the payment of said first installment; provided, however, that if each such successive and additional annual installment of \$25,000.00 together with said interest thereon, is not paid the First Parties within one year [90] after the payment to the First Parties of the preceding annual installment of said sum of \$25,000.00 as above provided, then the Third Party's option to purchase said United States patents shall forthwith terminate and the First Parties be entitled to the immediate return to them of said assignment of said patents so deposited in escrow and said First Parties shall also retain, for their own use, all sums and installments on said purchase price previously paid them and, in addition to the foregoing, the Third Party shall resume the payment of royalties on all said devices delivered by it after the expiration of one year from the last payment by it of any such in-

stallment on said purchase price and, in respect to said devices delivered by the Third Party between making its first payment on such purchase price and the date of its default in paying any such subsequent installment, the Third Party, in the event the amounts, so paid on account of the purchase price and forfeited as above provided, are insufficient to pay the royalties on all said devices so delivered during said period, shall forthwith pay to the First Parties an amount which, together with said forfeited payments on the purchase price, shall aggregate the total amount of royalties payable on said devices at the rates hereinafter set forth.

In the event of the completion of said sale of said United States and foreign patents to the Third Party by the delivery to it of said assignment, the First Parties shall, within ten days after such delivery, assign to the Third Party any and all licenses under said United States letters patent issued and granted to other parties by the First Parties within [91] forty days prior to the first payment made by the Third Party on account of such purchase price, together with the right to collect and retain all royalties and moneys payable to the First Parties under the terms of said licenses and accruing and becoming due and payable after such assignment thereof; it being understood and agreed that said sale of said United States letters patent to the Third Party shall be subject to all prior licenses thereunder granted by the First Parties and that such sale of said patents

shall not transfer to the Third Party any *bona fide* licenses, granted thereunder more than forty (40) days prior to such first payment on account of such purchase price, or any moneys or royalties payable to the First Parties under the terms of any such licenses, title to and ownership of which, together with any moneys and royalties payable thereunder, shall remain vested in the First Parties.

5. The Second Parties hereby sell, assign and transfer to the Third Party the business conducted by the Second Parties under said firm name of "Progressive Evaporator Company" together with the goodwill of said business (but excluding and not including any bills receivable, accounts receivable, bills payable or accounts payable, or other liabilities of date prior to January 1, 1922, all of which shall be collected or paid by the 2nd Parties), and all trade marks, trade names and labels used in connection with said business, together with all contracts, unperformed by them and all their business accrued since January 1, 1922, subject to legitimate liabilities for expense of conducting new business since January 1, 1922, and together [92] with all plans, drawings and advertising matter and stationery used by them in or for said business and the business records, list of present and prospective customers, and necessary correspondence, in relation to said business, together with the right to use, in any manner, the name "Progressive Evaporator Company," the name "Progressive Evaporator" and the name "Progressive Dehydrator" and the right to register said names, or any of them, as trade marks.

6. The Third Party shall use reasonable efforts and endeavors to promote and constantly increase the business done by it under the terms of this license agreement and, during the life of this license, shall not deal in, make or sell any type of evaporator, dehydrator, or dryer other than those embodying one or more of said inventions or improvements except such as may be taken in trade or such as are made and sold by the Third Party at a net profit to it of 25% or less and subject to the provisions of paragraph 7 hereof, except small evaporators, dehydrators or dryers of less than four truck capacity each, it being agreed no royalties are to be paid on said devices taken in trade, sold at a net profit of less than 25% or of a capacity less than four trucks each and none of which embodying any of said inventions.

7. In the event the First Parties devise or invent an evaporator of a capacity of less than four trucks, they shall forthwith disclose same to the Third Party who shall, within sixty days thereafter, notify the First Parties, in writing, whether or not such Third Party elects to make and sell such type of small evaporator. [93]

If the Third Party elects to make and sell the same, then it shall forthwith cease to and not thereafter make or sell any other type of evaporators of a capacity equal to or greater than the capacity of such small type of evaporator so devised or invented by the First Parties or by either of them, while continuing to make and/or sell such latter type and, on each and all such small evaporators,

so devised by the First Parties, or by either of them, and sold by the Third Party, the said Third Party shall pay royalties at the rates hereinafter set forth.

If the Third Party does not so elect to sell such small type of evaporator, so disclosed by the First Parties, or, after commencing to sell the same, ceases to do so, the First Parties may forthwith make and sell the same everywhere and until the exercise of the option provided for in the next paragraph.

After any such manufacture and sale by the First Parties of such small type of evaporator, the Third Party, during the life of this agreement, shall have the option of exclusively making and selling the same, subject to the payment of said royalties thereon, provided that the Third Party, more than thirty days prior to the expiration of any calendar year during the life hereof, gives the First Parties written notice that, commencing the first day of the succeeding year, the Third Party desires to thereafter exclusively make and sell such small type of evaporator; in the event such a notice of the exercise of said option is served, the First Parties shall discontinue the sale of such small type of evaporator after the expiration of the calendar year in which the notice is served and thereafter, [94] for the life of this agreement and subject to all the terms and conditions thereof, the Third Party shall have the exclusive right of making and selling the same.

8. For the purposes of this agreement, the capacity of one truck is understood and deemed to

be forty-four 3'x6' or 3'x8' standard field trays or their equal in capacity.

9. By way of royalty, the Third Party shall pay to the First Parties on each and every of said devices, directly or indirectly sold by the Third Party, for use in any country or territory in which applications for said letters patent on any of said inventions have been or may be filed, the following amounts:

a. On each and every such evaporator equipment, made by the Rees Blow Pipe Manufacturing Company, Inc., for the Third Party and sold by such Third Party, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

b. On each and every such evaporator equipment not made by said Rees Blow Pipe Manufacturing Company, Inc., and sold directly or indirectly by the Third Party for use in Washington, Oregon or California, \$75.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

c. On each and every evaporator equipment, sold by the Third Party for use other than in Washington, Oregon or California irrespective by whom the same is manufactured or from whom purchased, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

d. If said Rees Blow Pipe Manufacturing Company, [95] Inc. fails, refuses or neglects to furnish to the Third Party any such evaporator equip-

ment for use in Washington, Oregon or California within sixty days after an order therefor is duly given and accepted by said company, or in the event any such order for such equipment is not accepted by such company, or if both said First Parties dispose of their respective interests in said Rees Blow Pipe Manufacturing Company, Inc., then said royalties on any such equipment specified in any such order and sold by the Third Party for use in any of said states of Washington, Oregon or California, shall be \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.

10. The Third Party shall pay to the First Parties, share and share alike, either at 340 Seventh Street in the City and County of San Francisco, or at such other place or places, in said City as may be designated in a written notice or notices served on the Third Party by either of said First Parties in respect to the payment of such First Party's share of said royalties, the said royalties on each and every of such evaporator equipment within thirty days after the delivery thereof by the Third Party to the purchaser thereof from the Third Party.

11. At any time during the month of March of each and every calendar year during the life of this agreement, the First Parties, at their joint option, may terminate this agreement and license by serving the Third Party with a written notice to such effect provided the total royalties, paid by the Third Party to the First Parties on all said devices delivered by the Third Party prior to the calendar

year in which said notice is [96] served, do not amount to \$4,125.00 or more, on an average, for each and every calendar year prior thereto and subsequent to the execution hereof, but including the calendar year of 1922; upon the service of such notice in such event; this license agreement and all the terms and provisions thereof, excepting those covenants provided to be kept after the termination of the license hereby granted, shall terminate but without prejudice to the right of the First Parties to collect any unpaid royalties due or accrued at the time of such termination.

12. The Third Party shall keep full, true and accurate books disclosing the business done by it under the terms hereof and, at all reasonable times, during business hours, the First Parties and their representatives, shall have the right to examine said books and all other documents, bills, receipts, contracts and papers of the Third Party pertaining to said business and to make copies thereof for the purpose of checking any accounting under the terms hereof and for the adjustment of any controversy, in respect to any such accountings, but the information thus obtained shall be used for no other purpose.

13. The Third Party covenants that any and all letters patent respectively issued on said inventions are and will be good and valid in law in respect to each and all the claims thereof and covenants not to question or attack the validity thereof at any time during the life of this license or after the termination thereof, in the event of such ter-

mination prior to the expiration of said letters patent.

14. On each equipment, sold by the Third Party in the United States, and embodying any of said inventions covered [97] by any United States letters patent respectively issued on said applications, there shall be marked the word "Patented" together with the respective dates on such letters patent.

15. In the event of the infringement of the letters patent, or any of them, respectively issued for said inventions and improvements heretofore or hereafter made by the First Parties, or by either of them, the Third Party may request the First Parties to institute and prosecute an infringement suit against the infringer and, with said request, shall furnish the First Parties with a drawing and written description of the infringing device, together with the name and address of the infringer. If any infringement suit shall be brought by the First Parties upon such request, or otherwise, the entire costs and expenses thereof shall be borne by the First Parties, but if no such infringement suit is brought by the First Parties within ninety days after the service of such written request, against the party named as infringer in such request, the Third Party may at its option commence and prosecute such a suit in the names of the First Parties against such party so named as infringer in such request, and in that event the entire costs and expenses of commencing and prosecuting any

such infringement suit, so brought by the Third Party, shall be paid by said parties as follows: 75% of such costs and expenses by the First Parties out of the said royalties thereafter paid to them but not otherwise, and 25% thereof by the Third Party; it being understood and agreed, however that, out of the royalties accruing and becoming payable after the commencement of any such suit by the Third Party, in the names of the First Parties, the Third shall be entitled to [98] and may retain a sum, not exceeding one-half of such royalties, as they accrue, and apply such sum in payment of 75% of such costs and expenses so payable by the First Parties; at any time, the First Parties shall be entitled to take entire control through their own attorneys, of the prosecution of such a suit commenced by the Third Party in the names of the First Parties.

Within ten days after the commencement of any such infringement suit by the Third Party, said Party shall give the First Parties a written notice setting forth the title of such suit and the court in which brought.

16. In the event the Third Party fails to keep and perform any of the covenants or conditions herein contained to be kept and performed by it or in the event of the insolvency of the Third Party the First Parties shall have the right and option to declare this license agreement abrogated and terminated by serving a written notice to that effect on the Third Party and thereupon this license

agreement shall become abrogated and terminated and shall cease and come to an end, and all rights hereby granted and the right of practicing said systems or making and selling said devices shall cease and be terminated soledly by the service of said notice, without the necessity of any judicial proceeding, order, judgment or decree and as fully, completely and as effectually as if there had been a judicial judgment or decree of forfeiture, but such forfeiture shall be without prejudice to the rights of the First Parties to recover any royalties or license fees, or other movies that may be unpaid or due and owing, at the time from the Third Party to the First Parties. [99]

17. Upon the termination of this license agreement, prior to the expiration of the respective lives of all said United States letters patent, the Third Party covenants not to make, sell or deal in devices patented in or by any of said United States or foreign letters patent during the remainder of the lives of such letters patent and, in the event of such termination, the First Parties shall thereupon and thereafter be entitled to use, as a trade mark, trade name or otherwise, the word "Progressive" in respect to evaporators, dehydrators or dryers.

18. No waiver, by either party, of any breach of any of the foregoing covenants or conditions by the other Party, shall be deemed a waiver as to any subsequent and similar breach.

IN WITNESS WHEREOF, the said parties hereto have hereunto set, or caused to be set, their

respective names and seals, the day and year first above written.

_____ ,

_____ ,

First Parties.

_____ ,

_____ ,

Second Parties.

PROGRESSIVE EVAPORATOR COM-
PANY, INC.,

By _____ ,

President.

_____ ,

Secretary.

[Endorsed]: Filed and Entered Dec. 13, 1926
[100]

(Title of Court and Cause.)

STIPULATION FOR AMENDMENT OF INTERLOCUTORY DECREE.

Whereas an interlocutory decree was entered in the above-entitled action by the terms of which Hon. A. B. Kreft was appointed Special Master for the purposes indicated in the last two paragraphs of said interlocutory decree;

That whereas the said Hon. A. B. Kreft has declined to serve as such special Master in such case,

NOW, THEREFORE, It is hereby stipulated that Hon. Harry M. Wright, may be appointed a Special Master for the purposes indicated in said

decree in the place and stead of said Hon. A. B. Kreft,

And it is further stipulated that the said interlocutory decree may be amended accordingly and that an order of the above-entitled court may be made for the appointment of the said Hon. Harry M. Wright in the place of the said A. B. Kreft and for the amendment of said decree accordingly.

And it is further stipulated that neither this stipulation nor anything therein contained shall be construed as an admission on the part of the defendants that the said interlocutory decree or any of the provisions thereof should have been made, and it is understood and agreed that this stipulation is made without prejudice to the rights of the defendants or any of them.

Dated: December 30th, 1926.

KEYES and ERSKINE,

Attorneys for Plaintiffs.

SULLIVAN, SULLIVAN & THEO. J.

ROCHE,

Attorneys for Defendants.

[Endorsed]: Filed Dec. 30, 1926. [101]

(Title of Court and Cause.)

ORDER AMENDING INTERLOCUTORY DECREE AND APPOINTING HARRY M. WRIGHT AS SPECIAL MASTER IN PLACE OF A. B. KREFT.

It appearing that an interlocutory decree was given, made and entered in the above-entitled ac-

tion in which A. B. Kreft was named as Special Master for the purposes referred to in the last two paragraphs of said decree,

And it appearing that the said A. B. Kreft had refused to act as such Special Master,

NOW, THEREFORE, it is hereby ORDERED that said Harry M. Wright is hereby appointed Special Master for the purposes named in the last two paragraphs of said decree in place and stead of the said A. B. Kreft.

And it is further ORDERED, that the said decree be and the same is hereby amended in the following particular.

Done in open court, this 30 day of December 1926.

ST. SURE,
Judge.

[Endorsed]: Filed December 30, 1926. [102]

[Title of Court and Cause.]

Before Hon. GEORGE M. BOURQUIN, Judge.

TESTIMONY.

Thursday, July 22, 1926.

Counsel Appearing:

For Plaintiff: Messrs. KEYES & ERSKINE
H. W. ERSKINE, Esq.

For Defendants: SULLIVAN, SULLIVAN,
THEODORE ROCHE, EDWARD
BARRY, Esq.

Mr. ERSKINE.—Does your Honor desire me

make a statement of the pleadings in this case, and the issues in the case?

The COURT.—A brief one. As I see it, there is not very much to try, although there is a great mass of pleading. Proceed if you have any statement to make.

Mr. ERSKINE.—I was under the impression that your Honor had read the pleadings, and that perhaps that would obviate the necessity of making any statement.

The COURT.—I have scanned over them, but perhaps I got lost in the great maze of them. Proceed with your statement.

Mr. ERSKINE.—The situation is this: This is a stockholders' bill, commenced by Norman Lombard, and other plaintiffs, against the defendants, to enforce certain rights of [103] the Progressive Evaporator Company against the other defendants, because of the failure of the directors to enforce those rights. The bill alleges—

The COURT.—In other words, a stockholders' suit.

Mr. ERSKINE.—Yes, for the infringement of a patent. It is claimed by the stockholders that the corporation might have sued for the infringement of this patent, and as it has not sued the stockholder is suing. The corporation was the licensee of these patent rights. The infringers are the patentees, themselves. That is the reason the action is brought in the federal court, under the ruling in the case of *Littleton vs. Perry*, 21 Wallace, 223.

The complaint alleges, and we expect to show that the Progressive Evaporator Company, which is the corporation, was organized in February of 1922—

The COURT.—All of that is admitted and you will not be asked to submit any proofs on that, so you can proceed directly to the points in controversy. That brings it down to the stockholders meetings, and whether or not they were regularly called and who was at fault in the situation.

Mr. ERSKINE.—On October 27 a controversy and dispute ensued between the plaintiff, Lombard and Powell, his associate, and three other directors who were then Neal, Rees, and Hine. At that time Neal, Rees and Hine sought to oust Lombard from the presidency, and Powell from the secretaryship of this company. They accordingly called a meeting. On November 1st they adopted certain resolutions which ousted Lombard and Powell.

Lombard and Powell, on the other hand, fought and contested their ouster, and stated at that time that they were perfectly willing to be eliminated as officers of the company, but they [104] were afraid that that was just a move to take away the license of this company.

After the 1st of November, and up until a writ of mandate was granted by the District Court on appeal of this state on the 5th of February, Lombard and Powell, claiming to act as president and secretary of this company, and Neal and Hine, acting as president and secretary of the company—that was the situation then. Neal, Hine, and Rees

were also, as we will show, agreeing amongst themselves during that time to take away this license from the corporation, and thereby deprive the corporation of its main asset.

We will show that as soon as the row started, they discussed revoking the license. We will show that although they received vast sums of money, running into \$50,000 or \$60,000, they failed to apply, or rather, attempted to fail to apply those moneys on account of the moneys due them under the license, and applied them on other indebtedness which they claimed to be due them.

We will show that after they became president and secretary of the company they made no attempt to raise any money to take care of this indebtedness to themselves, and thus prevent themselves from cancelling this license.

We will show, on the other hand, that they had property in their hands which would have enabled them to pay the royalties due them and thus prevent them from cancelling this license. We will show that instead of doing that, they, from the very inception of the quarrel, started in and agreed to make arrangements with the president of the company to cancel the license and to allow him to take a license similar to this in his own name and a man named Ward, and proceed to operate.

We will show that they not only did that, but they stopped [105] the constructive business of the company as soon as they became president and secretary. That they never thereafter carried on any business. That they took advantage of the busi-

ness theretofore solicited by the corporation, and filled the orders theretofore obtained—at least solicited the prospects that the corporation had, and during the following year sold over 50 of these devices, which would have meant a large profit to the corporation if the corporation had been enabled to erect those machines.

We will show that of course it was useless under the circumstances to make a demand upon the president and the board of directors to bring this suit, and that, therefore, that was not done. We will show that this constitutes an infringement of the rights of this license agreement which was granted to this corporation.

I think that states, as briefly as possible, the situation.

Mr. BARRY.—Does your Honor wish any statement from the defense?

The COURT.—You can make it if you want to. I think perhaps you had better. We want to know what the issue is that we have to try here.

Mr. BARRY.—The defendants in this case will show substantially these facts: That at the time this corporation was formed Mr. Lombard was brought into the corporation as one who would promote the sale of preferred stock, and would finance the corporation, so that Rees and Hine, and the Rees Blowpipe Manufacturing Company, manufacturing these dehydrator plants, would be paid for the plants as they were manufactured.

The evidence will show that on October 25 the three [106] directors of the corporation, under

the authority given them by the by-laws, requested the president to call a meeting of the board of directors. He absolutely refused to do so. As a result of that, it was necessary for two of the directors, under the right granted them by the by-laws, to direct the secretary to call a meeting. A meeting was called for the 27th of October. Mr. Lombard, as the evidence will show, immediately phoned his home not to accept notice of that meeting. The evidence will show you that immediately at that time Mr. Lombard surreptitiously caused an entry to be made upon the books of the company changing the place to which notice of a meeting would be sent to him. That he started in from that moment to block any attempt of a majority of the directors to control the board of directors of the corporation, and to remove the officers, particularly the president and the secretary of the corporation.

The evidence will show that after a great deal of confusion and postponement, at the meeting on November 1st Messrs. Rees, Neal and Hine removed the president and secretary of the corporation.

The evidence will show that from that time forward Mr. Lombard and Mr. Powell—Mr. Lombard assisted by Mr. Powell—refused to permit the new president and secretary of the corporation to function.

The evidence will show that it was necessary to go to the Court of Appeals in order to get the records of this corporation.

The evidence will show that the Mercantile Trust Company, the registrar of the stock, was advised by Mr. Lombard not to register stock issued by the new president and the secretary of the corporation— [107]

The COURT.—Of course, you know it is not so much what Lombard may have been guilty of, the question is whether these defendants were responsible to the corporation.

Mr. BARRY.—The evidence will disclose those matters, and I will pass that for the time being.

The COURT.—Of course, if you can show that you have been unable to function because of the fault of somebody else, that is one thing.

Mr. BARRY.—We will show that from that time that is from October to April, 1923, Mr. Lombard blocked every move and attempt of the different officers of the corporation to function on behalf of that corporation. That as late as April 11 there was an attempt made to pass certain bills and obligations of the corporation, but Lombard, who had given notice to the Crocker National Bank that he and Powell were the officers of the corporation and not Neal and Hine, refused to join in the payment of any bills, or to consent to the withdrawal of any moneys for the purpose of paying bills.

Now, regarding the royalties, and that is the thing particularly in issue here, the evidence will show that from about April, 1922, until October 1922, royalties became due to Rees and Hine under their royalty agreement. The evidence will show that none of those royalties were paid at any time

That Lombard and Powell were in control of the presidency and the secretaryship of the corporation from April, 1922, until November 1st, 1922. That not one dollar was paid upon royalties during that period of time.

The evidence will show you that during that period of time moneys that were paid were applied by the Rees Blowpipe Manufacturing Company, to which it was paid, upon the so-called manufacturing account, which account was at all times [108] at least \$20,000 or \$30,000—or rather, there was an indebtedness of at least \$20,000 or \$30,000 from the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company.

The evidence will show that as each cash payment was made by the Progressive Evaporator Company, its president and secretary were notified by bills and statements sent to them that the moneys that were paid were applied toward the manufacturing account of the Rees Blowpipe Manufacturing Company, and that none of those moneys were applied toward royalties, and that the royalty account was not paid up to that very time, that is, on November 1st, at the time that the officers of this corporation were changed. The evidence will show you that under an authority and power given them in the license agreement, Rees and Hine gave notice on January 12, 1923, that because of the failure to pay royalties at this time during which they were blocked even in the management of the Progressive Evaporator Company by Lombard and Powell, that they had elected to and then and there

cancelled the license agreement, and that the license agreement was, therefore, no longer in effect.

So that the real issue in controversy here is, first, were the royalties paid, and, second, were the royalties paid at the time that the notice of cancellation was given? It is the contention of the defendant that those royalties were not only not paid then but that no royalty at any time had ever been paid from the time that they became due in April, 1922 up to the time that notice was given. [109]

TESTIMONY OF NORMAN LOMBARD, FOR PLAINTIFF.

NORMAN LOMBARD, called for the plaintiff sworn.

Mr. ERSKINE.—Q. What was your occupation beginning with February of 1922?

A. I was a business counsellor.

Q. Did you at that time become an officer and director of the Progressive Evaporator Company?

A. Yes, president of the company.

Q. President of the company, and a director thereof. A. Yes.

Q. How long did you remain the president of the company? A. Until November 1st, 1922.

Q. Are you still a director?

A. Yes, as far as I know.

Q. How much stock did you at first subscribe for?

A. In my own name one share, and in the name of Mr. Powell one share, preferred.

Q. At that time did you pay the money for the stock?

(Testimony of Norman Lombard.)

A. Yes, I paid for both my share and Mr. Powell's share.

Q. In that connection, was the stock issued?

The COURT.—Is there any controversy over this?

Mr. BARRY.—No controversy, at all.

The COURT.—Is it admitted in the pleadings?

Mr. ERSKINE.—The pleadings deny it.

Mr. BARRY.—No, I only denied, for want of information and belief, that he is still the owner of the stock. I had no knowledge as to that.

The COURT.—Proceed.

Mr. ERSKINE.—Q. You are still the owner of that stock?

A. Yes.

Q. And in that connection, you also received two and one-half shares of the common stock of this company at the same time, did you not? A. Yes.

Mr. ERSKINE.—I offer in evidence in that connection the [110] minutes of the corporation for April 17, 1922.

The COURT.—For what purpose?

Mr. ERSKINE.—Particularly that part of it on page 58 thereof, for the purpose of showing that this stock was issued to Mr. Lombard by the Board of Directors, the two and one-half shares of common and one share of preferred to him, and one to Mr. Powell.

The COURT.—Any controversy over that?

Mr. ERSKINE.—There is over the two and one-half shares.

(Testimony of Norman Lombard.)

Mr. BARRY.—There is not any controversy over the two and one-half shares, that is, unless something has slipped into that pleading that I know nothing of.

Mr. ERSKINE.—I took your allegations to mean that.

The COURT.—I don't want anything that is not necessary here. It will take long enough to try this case without that. It is not what this witness owns, but it is a question of what fault is there on the part of these directors.

Mr. ERSKINE.—Q. In that connection, there was an application, was there not, to the Corporation Commissioner, for leave to issue stock?

A. Yes.

Mr. ERSKINE.—I think it will be stipulated that that application is contained on pages 30 to 43 of these minutes which I have there, will it not?

Mr. BARRY.—If you tell me that those are the pages, all right.

The COURT.—What is this?

Mr. ERSKINE.—This is an application to the Corporation Commissioner for leave to issue this stock.

The COURT.—I don't see how that comes in at all in this case.

Mr. ERSKINE.—That comes in in connection with the proof [111] of our case that we were prevented from paying these moneys on account of this license. We now expect to show you that this application had been granted, and that it was

(Testimony of Norman Lombard.)

later on revoked at the request of Mr. Rees and Mr. Hine, who were two of the officers of the corporation, and directors; it was revoked on the 10th of November, and that they made the request particularly at that time to have it revoked—

Mr. BARRY.—Now, these things are not admitted at all, they are all *ex parte* statements on the part of Mr. Erskine.

The COURT.—Proceed. When was the application made?

Mr. ERSKINE.—The application was made on the 16th of February, 1922. I think it will be admitted. I offer in evidence the application, the copy of it appearing on pages 30 to 41 of these minutes, and ask that it be considered as if read.

The COURT.—It will be.

Mr. ERSKINE.—I also offer in evidence the permit thereafter granted, appearing upon page 46 of these minutes, and ask that it be considered as if read.

The COURT.—Very well.

Mr. ERSKINE.—Mr. Lombard, the permit of the Corporation Commissioner allowing the issuance of stock on a little bit different terms than the application requested, was issued; thereafter, was that modification accepted by you, and Mr. Neal, and Mr. Hine, and Mr. Rees, and the other parties concerned?

A. Yes.

Mr. ERSKINE.—I think it will be stipulated that the acceptance of the modification is the one

(Testimony of Norman Lombard.)

that appears on page 47, under date of April 1922. I offer that in evidence and ask that it be considered as if read.

The COURT.—I will admit it, but I don't say that it is material, at all. It was granted and acted under. I think [112] that is all that is necessary. Proceed. Anything further with the witness?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Then proceed directly to it.

Mr. ERSKINE.—Q. From the time that you became the president of the company, did you proceed to do business, carry on business?

A. Yes, we proceeded to solicit sales and conduct advertising and publicity matters looking to sales later on in the season. The evaporator season opens up only after the fruit is set on the tree there is not very much done early in the year.

Q. Did you make any sales?

A. There were 24 sales made by the corporation while I was president, that is, approximately 24.

Q. Do you recollect what the capacity of the plants was that were sold?

A. They were of various sizes.

The COURT.—The value is what is material come directly to that. Just show the cost price if you can.

A. (Continuing.) Something around \$80,000 to \$90,000. The records will show.

Mr. ERSKINE.—Q. When did the quarrel, if any, occur between you and Mr. Powell, on the or

(Testimony of Norman Lombard.)

hand, and Mr. Rees, and Mr. Neal, and Mr. Hine, on the other?

A. In the latter part of October, 1922.

Q. At that time was there a meeting held at which the quarrel cropped out? A. Yes.

Q. That was the meeting around October 24, was it not?

A. I would rather be guided by the minutes.

The COURT.—The exact date is not material.

A. (Continuing.) It was around that time.

Mr. ERSKINE.—Q. At any rate, there was one meeting held, [113] and then another, and then the third meeting was on October 27, which I will take the liberty of calling your attention to. At that meeting was anything said with respect to whether or not you *will* willing to step out as president of this corporation, provided this license agreement be protected?

Mr. BARRY.—I object to the question upon the ground that it is leading and suggestive. I think we ought to have the conversation.

The COURT.—It is preliminary. It is all right. He can answer it. Objection overruled. Answer the question.

A. I stated to Mr. Neal, and Mr. Rees, and Mr. Hine, who were attempting to hold a director's meeting, that if they would prepare a schedule of what was going to be done at that meeting, which would even include my ouster as president, that I would agree to the holding of such a meeting and approve the proceedings, provided they did not in-

(Testimony of Norman Lombard.)

volve a forfeiture or a cancellation, or an impairment of the license agreement, or words to that effect.

MR. ERSKINE.—Q. During that time, do you recollect any statement being made by anyone about the fact that the Corporation Commissioner had been called upon by Mr. Rees and Mr. Hine?

A. Yes, I called Mr. Rees' attention to the fact that he had called on the Corporation Commissioner. He said that his reason for doing that would come out in due course.

Q. That is what he said? A. Yes.

Q. Do you recollect whether or not at that time Mr. Rees said anything about what a fight would cost, so far as the license was concerned, and the company was concerned?

A. I don't think he mentioned the license at that time. He said that a fight would be very injurious to the company, or wreck the company, or words to that effect. [114]

Q. After that meeting, were you present at any other meetings of the Board of Directors of the corporation?

A. You mean after that meeting and the adjournments there? That was continued over two or three different meetings, two or three different days.

Q. I mean that meeting of October 27, when you were sent the telegram which I will show you a copy of.

(Testimony of Norman Lombard.)

A. I was present on November 1st, when they passed the resolution for my ouster.

Q. You were? A. Yes.

Mr. ERSKINE.—I offer in evidence the minutes of the meeting of November 1st. These, I think it will be stipulated, are the minutes made up by the defendants in the case. I just secured them from the possession of the defendants.

The COURT.—What is the object of this?

Mr. ERSKINE.—Just to show the removal of Mr. Lombard as president, and Mr. Powell as the secretary, and the appointment of Mr. Neal as the president and Mr. Hine as the secretary at that meeting on November 1st. I offer this in evidence and ask that they be considered as if read.

The COURT.—Admitted. They can go in as part of the record. They can be marked, if you want them marked.

Mr. ERSKINE.—I would like to have them marked.

The COURT.—Very well.

(The minute-book was here marked Plaintiff's Exhibit No. 1.)

Mr. ERSKINE.—I have here a copy of minutes, obtained from the other side this morning, which carry minutes of adjourned meetings from this meeting of November 1st, carrying the meetings up to January 13th. I think it will be stipulated that these minutes that I hold in my hand, Mr. Barry, are those that you gave me this morning, and are the minutes that were [115] prepared by

(Testimony of Norman Lombard.)

Mr. Hine, the secretary of the company. I ask that they be admitted in evidence.

The COURT.—What is the object of that?

Mr. ERSKINE.—Simply to show that this meeting on January 13th the day that the license was cancelled, purported to be just an adjourned meeting, and how it was held, and how it came to pass and the circumstances leading up to it.

The COURT.—Of course, you want to show that but what object will it serve in the case? You might show a whole lot, but if it didn't go to some issue here in this case it would not be material. What does it show?

Mr. ERSKINE.—It shows that Lombard and Powell really had no notice of these meetings, and were not present when this license was cancelled.

Mr. BARRY.—In order that there will not be any misapprehension, the minutes of January 13th do not show that any license was canceled at that meeting.

Mr. ERSKINE.—I will read that minute in connection with the cancellation of the license.

The COURT.—Point it out if you want to read it to the Court.

Mr. ERSKINE.—“President Neal announced that he had received a written notice from Claude Rees and C. F. Hine, cancelling the license agreement between them and this corporation, and thereupon produced said notice at said meeting; no action was taken upon the matter.”

(Testimony of Norman Lombard.)

The COURT.—That shows that Neal and whoever had the patent cancelled the license—not the corporation. Proceed.

Mr. ERSKINE.—Neal was the president of the company at that time, your Honor.

The COURT.—I understand that, proceed. [116]

(The document was marked Plaintiff's Exhibit No. 2.)

Mr. ERSKINE.—Q. Referring to these various meetings after November 1st, which purport to have been held, according to these minutes which I hold in my hand, on November 2d, on November 4th, on November 6th, on November 10th, on November 17th—purporting to be adjourned from time to time—and on November 25, and on November 29, and on December 11, and so forth up to January 13, were you present at any of them?

A. No.

Q. Was Mr. Powell, so far as you know, present at any of them? A. Not so far as I know.

Q. Were you notified, except as it was an adjourned meeting from November 1st, were you notified of those meetings at all?

A. I had no actual notice.

Q. Were you ever given any notice of the cancellation, or was it called to your attention by Mr. Neal, the president of the company, that he had received this notice of cancellation? A. No.

Q. Did anybody call it to your attention?

A. No.

Q. Was any meeting of the directors ever called,

(Testimony of Norman Lombard.)

either at the office that you had, or else at the office which was adopted by the corporation, by the new directors, in the Humboldt Bank Building, after November 1st, 1922?

Mr. BARRY.—I object to that question on the ground that it calls for the conclusion of the witness, and that the minutes are the best evidence.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Were you ever given any notice—

The COURT.—He has already answered that he had no actual notice. Don't go over that again. Proceed.

Mr. ERSKINE.—Q. Were you ever told by anyone, subsequent [117] to November 1st, or at any time, of this proposed cancellation of this license?

A. My first actual knowledge of the cancellation, to the best of my recollection, was when Mr. Hine testified on the stand in the Superior Court; but an intimation was very strongly given to me that that was the intention when Mr. Barry, and Mr. Theodore Roche, and Mr. Erskine, and I were walking up the street from the court; Mr. Barry at that time said that if we won the case the licensors were going to cancel the license, anyway, so that if we won we lost.

Q. Do you recollect the date of that conversation?

A. No, I do not, but I made a memorandum of the conversation which shows the date.

Q. Is this the memorandum? A. Yes.

Mr. BARRY.—Just a moment. I submit that

(Testimony of Norman Lombard.)

the memorandum can only be used to refresh the witness' memory.

Mr. ERSKINE.—He said he did not know the date.

Q. Does that refresh your memory as to the date of that conversation?

A. Wednesday, November 29th.

Q. 1922? A. 1922.

The COURT.—Proceed with your examination.

Mr. ERSKINE.—Q. After November 1st, and after this row started, was the place of business of the corporation changed?

A. A resolution was passed changing the office up to the Humboldt Bank Building.

Q. You were not present when that resolution was passed, were you?

The COURT.—Well, I don't see that that is material. The big question here is whether this witness and his colleague are the directors in management, or the others. Whatever was done in the course of carrying on the business of [118] the corporation is not at all material, such as moving offices, and such like.

Mr. ERSKINE.—I am directing this evidence to the point that after this row started there was no business done by this company at all.

The COURT.—Then have him say so. I don't care where the offices were, or how many they had, or the furniture, or anything like that. Proceed.

Mr. ERSKINE.—I wanted to direct your Hon-

(Testimony of Norman Lombard.)

or's attention to the fact that the office of the company was vacated.

The COURT.—Have him state it.

Mr. ERSKINE.—Q. Did you ever visit the office at the Humboldt Bank Building, to which the office of the Progressive Evaporator Company had been moved, according to this resolution?

The COURT.—I think the defense admits that the offices were not kept up and that no business was done.

Mr. BARRY.—And we allege specifically the reason why.

The COURT.—Don't waste any time on these matters, even if they are material, which I doubt. Proceed.

Mr. ERSKINE.—Q. Do you know whether or not the permit of the Corporation Commissioner to issue stock was revoked?

Mr. BARRY.—We object to the question as entirely immaterial.

Mr. ERSKINE.—It certainly is material.

The COURT.—To show what?

Mr. ERSKINE.—It is to show that there was an interference with our chance of doing business.

The COURT.—Well, we will hear it, provided counsel follows it up by showing who was responsible for it. Objection overruled. [119]

A. It was suspended, as I recollect it, not revoked.

Mr. ERSKINE.—Q. It was suspended?

A. Yes.

(Testimony of Norman Lombard.)

Q. On or about what date?

A. After the row occurred in the latter part of October, and before the meeting on January 6—the stockholders meeting on January 6.

Mr. ERSKINE.—I think it will be stipulated that it was revoked on or about November 8, will it not?

Mr. BARRY.—Yes, if that is the date; in other words, we will stipulate that that is the date, subject to correction; if we find that that is not the date we will correct it.

Mr. ERSKINE.—Q. I understood you to say that at the beginning of this controversy Mr. Rees did state to you that he had been to the Corporation Commissioner.

A. Yes. That conversation occurred during the meeting on October 27, I think it was.

Q. Were any plants sold by Mr. Neal for this corporation after November 1st, or after this row started?

A. The Progressive Evaporator Company, Inc.?

Q. Yes.

Mr. BARRY.—Just a moment. The question is objected to, because it calls for the conclusion of the witness.

Mr. ERSKINE.—Your Honor, Neal might have made sales for this other concern that took over the license. I think I have the right to direct his attention to the sales made.

The COURT.—He might have made them without this.

(Testimony of Norman Lombard.)

out this witness knowing anything about them.
Objection sustained.

Mr. ERSKINE.—Q. As far as you know, do you know whether any sales were made for the corporation by anybody, of evaporator plants?

Mr. BARRY.—The same objection.

The COURT.—Objection sustained. [120]

Mr. ERSKINE.—Q. Do you know whether or not any orders were secured subsequently to this row, by Mr. Neal, as sales manager, or by anybody else, for the Evaporator Company?

Mr. BARRY.—The same objection, your Honor but only to that part of it referring to the Evaporator Company.

The COURT.—Objection sustained. I think they admit that no business was done after that, as I remember the pleadings. Proceed.

Mr. ERSKINE.—Q. Now, coming to the question of payments, the Progressive Evaporator Company had an agreement not only with Mr. Rees and Mr. Hine—the license agreement, which is Exhibit “B” attached to the complaint, the execution of which is admitted, but also had an agreement with the Rees Blowpipe Manufacturing Company. I will offer that agreement in evidence, your Honor. It is on pages—

Mr. BARRY.—That is the manufacturing agreement that you are speaking of now, is it?

Mr. ERSKINE.—Yes, the manufacturing agreement. It is on page 60 of the minutes of the corporation, the meeting of April 17, 1922. I ask that

(Testimony of Norman Lombard.)

it be considered as if read. I do not think it is in the pleading, and I do not think it is admitted by the pleadings.

The COURT.—It may be so considered.

Mr. ERSKINE.—Q. You proceeded to manufacture plants, did you not?

A. We were the selling organization. The Rees Blowpipe Manufacturing Company was the manufacturing concern.

Q. You gave them orders to manufacture plants?

A. Yes.

A. And they manufactured plants, did they not?

A. Yes.

Q. There became due to them, and to Rees and Hine, the patentees from time to time royalties, and also moneys for the manufacture of the plant?

A. Yes. [121]

Q. Will you state to the Court what was the method of procedure in the payment of those? What was said and done when payments were made from time to time on those accounts?

A. Of course, the relations were very friendly between Messrs. Rees and Hine, both as licensors, and directors, and owners of the Rees Blowpipe Manufacturing Company at that time; we had lunch together frequently—

The COURT.—Read the question. (Question read by the reporter.) Now answer the question.

A. (Continuing.) Usually following those luncheons these men would come to the office, Mr. Rees and Mr. Hine, and they would there receive checks

(Testimony of Norman Lombard.)

to be applied on account—the checks of the Progressive Evaporator Company, drawn on the Crocker National Bank. Those were handed to Mr. Rees or Mr. Hine when they were there together. That is the way settlements were effected.

Mr. ERSKINE.—Q. Was anything said at that time with respect to how those moneys should be applied?

A. No, there was never anything said definitely, because the accounts were all considered as one lump sum.

Mr. BARRY.—I move to strike out that part of the answer referring to the accounts being considered as one lump sum.

The COURT.—Granted.

Mr. ERSKINE.—Q. Was anything said at any time when those notes and cash were delivered whether or not they should be applied on account of royalties, or on account of the manufacturing expense?

A. No. These men were directors of the Progressive Evaporator Company, we were not dealing with them at arms'-length, and never anything was said about it.

Mr. BARRY.—I move to strike out the answer, particularly that part of it wherein he said they were not dealing at arms'-length. [122]

The COURT.—Granted. Just answer the question. Never mind the reasons why. Your counsel will argue the case later on.

(Testimony of Norman Lombard.)

Mr. ERSKINE.—Q. Were you ever told by Mr. Rees or by Hine that they were leaving the royalty account open? Was that ever brought to your attention as president of the company?

A. No.

Q. Did you know that they were not applying any of the moneys paid to them, either in cash or by note, to the royalty account? A. No.

Q. Was a demand ever made by them upon you as the president of the company, up to November 1st, or thereafter, for the payment of any of these royalties? A. No.

Q. After November 1st, or at any time, were you told that they were going to cancel this agreement and they claimed that not a cent had been paid on royalties to them?

A. No. So far as I know the first intimation I had of that was Mr. Hine's testimony.

Q. What was the price at which you sold—at which the Progressive Evaporator Company sold the plants which you obtained from the Rees Blow-pipe Manufacturing Company?

A. It is some time ago that I don't remember exactly. The smaller plant was from \$4,500 to \$5,000; the medium size was around \$7,500, and the large plant was around \$12,000 to \$15,000.

Mr. ERSKINE.—Maybe we can stipulate to that right now, Mr. Barry.

Mr. BARRY.—If you are giving the figures set forth in your pleading, I think we can admit them.

(Testimony of Norman Lombard.)

Mr. ERSKINE.—In the pleading, I only pleaded general damages. [123]

Mr. BARRY.—Well, I think we will stipulate with counsel on that. We can get those figures.

The COURT.—He has answered the question and given the prices. Proceed.

Mr. BARRY.—I am not stipulating to those prices, your Honor, but I will check up with our client and agree with Mr. Erskine upon the prices.

The COURT.—He is proving it. Proceed.

Mr. ERSKINE.—Q. Was any statement ever made, as far as you know, to the Progressive Evaporator Company, by the Rees Blowpipe Manufacturing Company, showing what the cost of the manufacture of these various plants was?

A. No.

Q. And was any accounting ever given the Progressive Evaporator Company by Rees Blowpipe Manufacturing Co., showing what the cost of these plants was, as far as you know?

A. No.

Q. In your opinion, Mr. Lombard, was the license agreement which this corporation held of any value?

A. Yes, it was of great value, it was a very profitable license agreement.

Q. And the profit which was made under that license agreement was the difference between what your contract called for with the manufacturer, the Rees Blowpipe Manufacturing Company, and what you sold those for?

Mr. BARRY.—I object to the question on the ground that it eliminates probably a dozen other elements, such as sales, costs, and so on.

The COURT.—That would be the gross profit. That shows for itself, so far as that goes. That is evident. Save for overhead and sales expenses, etc., whatever you paid for them, the profit was the difference between that and what you sold them for.

Mr. ERSKINE.—The overhead would not be a deduction [124] because they are entitled—

The COURT.—Who paid the cost of running the Progressive Evaporator Company, and making sales, and the like?

Mr. ERSKINE.—No one after November 1st.

Mr. BARRY.—We are not concerned with that now, your Honor.

The COURT.—I think I understand the matter. Proceed. If it ever comes to an accounting, it will be done before a commissioner.

Mr. ERSKINE.—May I ask Mr. Barry if he will stipulate with me as to the sales price from the Progressive Evaporator Company to purchasers?

Mr. BARRY.—Yes, I will.

Mr. ERSKINE.—And if you will also stipulate what was the charge made by the Rees Blowpipe Manufacturing Company for manufacturing these machines?

Mr. BARRY.—Yes.

Mr. ERSKINE.—And also will you stipulate what the commission allowed to salesman was?

Mr. BARRY.—We will stipulate to the probable running expenses of the Progressive Evaporator

(Testimony of Norman Lombard.)

Company. I cannot differentiate between commissions and other expenses.

The COURT.—As the Court said before, if there is any accounting, it will be before a Master later on. If you make a *prima facie* showing that you are entitled to an accounting, you will have it. Proceed.

Mr. ERSKINE.—Q. An injunction restraining you from voting your stock was served on November 6, was it not?

A. January 6, wasn't it?

Q. No, I think it was November 6. I think that will be stipulated to. [125]

Mr. BARRY.—November 6th is correct.

Mr. ERSKINE.—Q. On February 5, 1923, you were served with a writ of mandate in the action of the Progressive Evaporator Company against Norman Lombard et al., were you not?

A. That was the mandate to turn over the books, was it?

Q. Yes.

A. Yes. I don't know as to the date I was served; the mandate, itself, will show the date it was issued.

The COURT.—Has this matter been tried in some other court?

Mr. ERSKINE.—It has been in two other courts, your Honor, but not this particular issue. The question of who should control this company was fought bitterly from November 1st until February

5, in both the Superior Court and in the District Court of Appeals.

The COURT.—And judgment rendered against somebody?

Mr. ERSKINE.—A writ of mandate was rendered, placing the control in the hands of Rees, and Neal, and Hine.

The COURT.—Can you tell the Court why that is not *res adjudicata* here?

Mr. ERSKINE.—It is not *res adjudicata* on the question as to whether or not these directors had the right to deal between themselves.

The COURT.—No, but it determines who had the proper control of the company, so far as that goes.

Mr. ERSKINE.—Yes.

The COURT.—Then why are we dealing with notices and whether these people were ousted properly, or not? That has been settled.

Mr. ERSKINE.—I am not putting it in for that purpose.

The COURT.—I cannot see that it serves any other purpose, not even for scenery. [126]

Mr. ERSKINE.—My reason for doing that was to show that on the 12th or 13th of January these gentlemen met together and stripped the company of its major asset. That is the only purpose.

Mr. BARRY.—May I state, your Honor, that the minutes of the meeting of that date show that on the day before notice had been given to the president by the owners of these patents.

The COURT.—Proceed with what is material.

Don't waste time on what is not material. You tell the Court now that there are judgments standing that these directors were in lawful control of the company; that being true, I don't care to hear any of the previous wrangles between them, and you cannot set up at this time that they were not in control of the company properly. You can proceed and show wherein they mismanaged the corporation, if you have any point in doing so.

Mr. ERSKINE.—That is just the point, your Honor.

The COURT.—Then proceed and show that, and don't waste any time in filling.

Mr. ERSKINE.—Mr. Barry, have you the original notice of cancellation that was served on Mr. Neal on the 12th day of January, 1922, and which he called to the attention of the directors on the 13th, and which they said they would take no action about, in accordance with the minutes?

Mr. BARRY.—Yes.

Mr. ERSKINE.—I have here, your Honor, this notice of cancellation dated January 12, and which is the one, I think it will be stipulated, was referred to in these minutes of January 13.

Mr. BARRY.—That is correct.

Mr. ERSKINE.—Are there any other minutes of any meetings of this corporation subsequent to January 13? [127]

Mr. BARRY.—Not that I am advised of. I think they adjourned at that time without adjourning to any specific time.

(Testimony of Norman Lombard.)

Mr. ERSKINE.—On the 13th of January they adjourned, and thereafter, as far as you know, held no other meetings?

Mr. BARRY.—I think that is correct.

Mr. ERSKINE.—And on January 12 this notice was served on Neal, the president of the company, and this is the one he refers to in the minutes of January 13. I offer this in evidence and ask that it be considered as if read.

The COURT.—Admitted.

Mr. ERSKINE.—It simply states that there are \$7,260 due on royalties, none of which has been paid, and it cancels this license. That is signed by Rees, and Hine, two of the directors. They sign it individually. It was served on the president of the company.

(The document was here marked Plaintiff's Exhibit No. 3.)

Q. Was this notice ever called to your attention by Mr. Neal, the president, or were you ever told about it, or ever shown it?

A. Not so far as I recollect.

Q. And until you heard Mr. Hine testify about it in court in February before Judge Murasky, I understand you to say you had no notice of it?

A. I think that was the first intimation I had of the cancellation of the license.

Mr. ERSKINE.—I think that is all.

The COURT.—Cross-examine.

(Testimony of Norman Lombard.)

Cross-examination.

Mr. BARRY.—Q. You stated that your business is that of a business counsellor: Is that correct?

A. Yes.

Q. You are also an attorney at law, are you not?

A. I am a member of the bar, but I do not practice. [128]

Q. You are a member of the bar who does not practice. You have engaged yourself in the financial business, as it were, for some years past, have you not?

A. Financing was a part of my business.

Q. Originally when you came into this corporation, the license agreement was transferred to the corporation in consideration of certain shares of stock: Is not that correct, just summarizing this situation briefly?

Mr. ERSKINE.—I submit that the license agreement and the minutes speak for themselves.

Mr. BARRY.—All right.

Q. It is a fact, is it not, that whatever interest you got in this corporation you got under an agreement from Rees and Hine that they would transfer their interest in this stock—the common stock—to you if you would come in there and finance this corporation? Is not that correct?

Mr. ERSKINE.—I object to that on the ground that it is improper cross-examination, and is not within the issues in this case, and on the ground that the minutes show, and the records show, which

(Testimony of Norman Lombard.)

have already been introduced in evidence, that the witness paid \$200 for two shares.

Mr. BARRY.—That is preferred stock, your Honor.

The COURT.—Objection sustained; I don't see that it is material.

Mr. BARRY.—Q. Now, coming forward to the meeting of October 27, the minutes show here that there was a meeting held on that date; was there not a form of meeting that the directors went through on October 25, at which resolutions were passed?

Mr. ERSKINE.—The same objection, your Honor, not proper cross-examination, not within the issues of the case. [129]

Mr. BARRY.—It touches on this situation, your Honor, and is material to it.

The COURT.—The records in evidence show your meetings. What do you want to show?

Mr. BARRY.—I want to show that this man held a meeting as president of the corporation, and then repudiated it.

Mr. ERSKINE.—What does that have to do with it?

The COURT.—Just a moment. No wrangling between counsel. Don't your minutes show that?

Mr. BARRY.—No, your Honor. I want to show that that meeting was held for some two or three hours, and then repudiated by the president.

The COURT.—Objection overruled.

(Testimony of Norman Lombard.)

Mr. ERSKINE.—Exception.

A. What is the question?

Mr. BARRY.—Q. On October 25 you went through the form of a meeting, did you not, a directors' meeting?

Mr. ERSKINE.—That is objected to, your Honor, on the ground that it is improper cross-examination, and calls for the conclusion of the witness.

The COURT.—Objection overruled.

Mr. ERSKINE.—Exception.

A. I don't remember the date. I think I remember the meeting you refer to, when they discussed certain expense accounts, and certain resolutions were passed, and the meeting was adjourned to the next day.

Mr. BARRY.—Q. And the next day, when that meeting was called to order by yourself, or while you were there with the other directors, Mr. Rees or Mr. Hine suggested that the directors present sign a waiver of notice, so that the meeting could be regularly held, did they not? [130]

Mr. ERSKINE.—That is objected to upon the ground that it is immaterial, irrelevant, and incompetent, and not proper cross-examination. Here is the situation, your Honor: If we are going into the question of whether this meeting was properly held, or not, it is going to open up the door to one of the wrangles your Honor has just said is immaterial.

The COURT.—I think it has developed that you don't need any of that. You have a court judgment that your directors are the directors.

(Testimony of Norman Lombard.)

Mr. BARRY.—Very well, your Honor.

Q. On the 25th, you say you did not recognize the proceedings that took place under you on the 24th?

Mr. ERSKINE.—The same objection to that, your Honor.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Now, coming forward to the meeting on October 27, you refused to call that directors' meeting to order on October 27th, did you not?

Mr. ERSKINE.—The same objection to that, your Honor.

Mr. BARRY.—The minutes show that this meeting was held.

Mr. ERSKINE.—The same objection, immaterial, irrelevant, and incompetent.

Mr. BARRY.—Your Honor, if it were not for the fact that these matters were gone into by the other side, I would not have to go into them now.

The COURT.—That was before I knew you had a judgment foreclosing these matters. You don't have to go into those matters. It is just as though those questions never had been asked.

Mr. BARRY.—Very well, your Honor.

Q. These minutes introduced in evidence by your counsel, beginning with the meeting on November 1st, you knew, did you [131] not, that the meeting of the directors held on November 1st was the meeting which had been adjourned over from October 27: Is not that correct? That is correct, is it not?

(Testimony of Norman Lombard.)

A. I don't remember those details, Mr. Barry.

Q. I show you the portion of the minutes which precedes the part used by your counsel, and I will ask you if it is not a fact that the meeting at which you were present on November 1st, and in which you did not participate, was a meeting adjourned over from October 27?

The COURT.—Does it show that?

Mr. BARRY.—Yes, it shows it.

The COURT.—Then it will be so treated.

Mr. BARRY.—I offer in evidence the remainder of these minutes, beginning with October 27, and leading up to November 1st, and showing the notice under which that meeting was held.

The COURT.—I understand they are all in evidence.

Mr. BARRY.—No, your Honor. Counsel started in with the meeting on November 1st.

The COURT.—Very well.

(The document was here marked Defendant's Exhibit "A.")

Mr. BARRY.—Q. Now, Mr. Lombard, on November 1st you were present at the meeting, were you not?—I mean physically present, even though you did not participate. A. Yes, I was there.

Q. And you knew, and you were present at the time that that meeting was adjourned over until a later date, were you not? A. Yes.

Q. You paid no attention to the fact that the meeting was adjourned over until another date, did you?

Mr. ERSKINE.—I think the minutes in evidence

(Testimony of Norman Lombard.)
here show [132] that Mr. Lombard left before the adjournment.

Mr. BARRY.—I have his testimony, your Honor.

The COURT.—If you have any objection to make, make it. He has answered that he was there.

Mr. BARRY.—Very well, your Honor.

Q. It is a fact, is it not, that you did not choose to go to any meeting of the Board of Directors after November 1st. Is not that correct?

A. I could not answer that, Mr. Barry; I did not choose to go to a meeting of the Board of Directors.

Q. It is a fact that you did not attend any meeting of the Board of Directors after November 1st, is it not? A. That is correct.

Q. And you did not bother yourself with finding out whether those meetings were adjourned over, or to what dates they were adjourned over, did you?

A. No.

Q. And the reason why you did not do this was because all of this time you were protesting that Mr. Hine was not secretary of the corporation, and Mr. Neal was not its president. Is not that correct?

A. Do you want me to state my reasons?

Q. I am asking you if that is not the reason.

A. Not entirely, no.

Q. That is practically your entire reason, is it not? A. No.

Q. Then state the rest of your reasons why you did not attend any other meeting?

A. It obviously would have been useless, because the majority of the Board of Directors was in hos-

(Testimony of Norman Lombard.)

tile hands, and I did not want to embarrass myself or prejudice my position by getting into any meeting with them.

Q. You did not recognize their authority to hold a meeting or to call a meeting, did you?

A. I was resisting it in the courts.

Q. You took the position in the Superior Court and in the [133] District Court of Appeal in the *mandamus* proceeding that these gentlemen were not the officers of the corporation, did you not?

A. Yes, I took the position that the Board of Directors had been ousted.

Q. You took the position that these gentlemen had no right to call or to hold a meeting?

A. That is right.

Q. The matter was pending in the District Court of Appeal until decided there, and then you petitioned for a rehearing to the Supreme Court, did you not, in the *mandamus* proceeding?

A. I don't remember what the procedure was.

Q. At any rate, the writ of mandate was issued on February 5, or about that date?

A. Approximately so; the writ is there and it will show.

Q. When that writ of mandate was issued, did you recognize the authority of Mr. Neal as president and Mr. Hine as secretary of this corporation?

A. I turned over the books to them in accordance with the writ.

Q. The writ required you to turn over the books; but you had prior to that time given notice to the

(Testimony of Norman Lombard.)

Crocker National Bank that you were the president and Powell was the secretary of the corporation, and that they had no right to recognize the corporation, did you not—that is, I mean these gentlemen?

Mr. ERSKINE.—The written document speaks for itself.

The COURT.—If you are asking for a writing, the witness has the right to see it on his cross-examination. Objection sustained.

Mr. BARRY.—Q. You recall the fact that you gave a notice to the Crocker National Bank, the depository of the corporation? A. Yes.

Q. Have you got that notice? [134]

Mr. ERSKINE.—I will produce it. The Crocker Bank is here under subpoena. Mr. Lux is here from bank. The officer of the Crocker National Bank has a photostatic copy of this letter which he would like to submit in place of the original.

The COURT.—If the parties are willing, the Court has no objection.

Mr. BARRY.—I have no objection.

The COURT.—Proceed with your examination.

Mr. BARRY.—Q. I show you a photostatic copy of a letter dated November 1, 1922, addressed by you as president of the Progressive Evaporator Company to the Crocker National Bank, and I will ask you if that notice was given by you to the bank, the original of it, at or about the date that it bears?

A. Yes.

Mr. BARRY.—I offer the notice in evidence at this time, reading as follows, on the letter-head of

(Testimony of Norman Lombard.)

the Progressive Evaporator Company, dated November 1, 1922, addressed to Crocker National Bank, San Francisco, California,

DEFENDANT'S EXHIBIT "B."

"Gentlemen:

Confirming by verbal instruction given to your Mr. Dean, will you please take notice that, in view of the fact that certain persons may claim to be acting as official representatives of this company, you will honor no checks or other instructions that you may receive from any such other than in accordance with the duly certified authorizations filed with you prior to this date.

Very truly yours,

PROGRESSIVE EVAPORATOR COMPANY, INC.,

By NORMAN LOMBARD,
President."

(The document was here marked Defendant's Exhibit "B.")

Q. Were you familiar with the fact that on November 1st, 1922, Mr. Hine, purporting to act as secretary of the corporation, gave a notice a copy of which I now show you, to the Crocker [135] National Bank?

A. I don't remember whether I had any knowledge of that, or not.

The COURT.—I cannot see that this is material. You are both assuming to be entitled to be in charge

(Testimony of Norman Lombard.)

of the corporation, and you gave notice one as against the other.

Mr. BARRY.—That is what it amounts to, your Honor.

Q. After the District Court of Appeal and the Supreme Court disposed of the *mandamus* proceeding, did you withdraw the notice which you had filed with the Crocker National Bank, so that Mr. Hine and Mr. Neal could without any objection from you draw checks upon the account?

Mr. ERSKINE.—That is objected to, your Honor, on the ground that it is argumentative, immaterial, irrelevant and incompetent, and not proper cross-examination.

Mr. BARRY.—I will follow it up by showing that the bank, even after that, refused to pay out money without the consent of Lombard, and that Lombard still objected to moneys being withdrawn from the bank.

Mr. ERSKINE.—That is a matter of defense, your Honor.

The COURT.—Yes, I think so. Objection sustained.

Mr. BARRY.—Q. You testified here that certain royalties became due to Rees and Hine under the royalty agreement. You were acquainted with the terms of that royalty agreement, were you not?

A. Yes.

Q. You were acquainted with the fact that the royalty agreement provided that royalties would be paid to Rees and Hine, share and share alike?

(Testimony of Norman Lombard.)

A. Yes, the agreement so provided, but we had—

Q. I am asking you about your knowledge of the agreement. Did you know of that provision in the agreement?

A. Yes, but I want to explain my answer—

The COURT.—No explanation is necessary now. He is simply [136] asking you whether you knew that. If there is any other answer or explanation necessary your own counsel will draw it out on re-direct.

Mr. BARRY.—Q. Did you, or did Mr. Powell as secretary of the corporation, ever issue to Rees and Hine a check payable to Rees and Hine, drawn out of any moneys of the Progressive Evaporator Company?

A. We never issued a check in their favor, but we handed them many checks.

Q. All the checks that you handed them are summarized in these photostatic copies I now hand you—are they not?

A. I don't know whether these are all, or not.

Q. At any rate, you remember having under your own supervision these photostatic copies made?

A. These were not all, by any means. There are many others. These are only six.

Q. We will show how many others there were. Now, let us go to the check of January 27, 1922—

Mr. ERSKINE.—It must be June 27, Mr. Barry.

Mr. BARRY.—Yes, June 27, 1922.

Q. At the time that that check was paid to Mr. Rees, or Mr. Hine, and payable to the Rees Blow-

(Testimony of Norman Lombard.)

pipe Manufacturing Company, was anything said about whether it was to be applicable to royalties, or to the manufacturing account of the Rees Blowpipe Manufacturing Company?

A. No, the question of royalties never arose.

Q. Was anything said at the time that any of these six checks, photostatic copies of which I now show to you, were handed to either Rees or Hine, the checks being payable to the Rees Blowpipe Manufacturing Company, as to whether those moneys were to be applied toward royalties, or to the manufacturing account?

The COURT.—You want to show that nothing was said, do you? [137]

Mr. BARRY.—Yes, your Honor, I want to show a negative.

The COURT.—He has admitted that particularly in direct examination.

Mr. BARRY.—Very well, your Honor.

Q. Did you actually know how the check of June 27, 1922, was actually applied?

A. You mean on their book?

A. Yes, on their books, as shown by the statement they rendered to you?

A. No, I don't know anything about their books.

Q. You know something about the statements received by the Progressive Evaporator Company from the Rees Blowpipe Manufacturing Company, do you not? A. Yes.

Q. When those statements came in, they in due course reached your hands, did they not?

(Testimony of Norman Lombard.)

A. Yes. They showed the royalty, the Rees Blowpipe Manufacturing Company's statement, as a part of the account.

Q. I show you a statement dated July 28, 1922, on the statement-head of the Rees Blowpipe Manufacturing Company, and I will ask you whether that statement came to your attention at or about the date that it bears?

A. I cannot remember that.

Q. Did you not produce that statement in Judge Murasky's courtroom, and is it not an exhibit marked there in that courtroom?

A. It may be, I don't know.

Mr. BARRY.—You will admit that, will you not, Mr. Erskine?

Mr. ERSKINE.—I will admit that he produced it, but that was six months afterwards.

Mr. BARRY.—Q. Did that statement dated July 28th come to your attention at or about the time that that statement bears?

A. I have not any definite knowledge on that; I assume it did.

Q. And is it not your best recollection that the statement produced in Judge Murasky's court as an exhibit there did come [138] to your attention at or about that time?

A. I would not say that it was my best recollection, because I have no recollection about it.

Q. You have no recollection about it?

A. No, not at this time.

(Testimony of Norman Lombard.)

Q. I show you a statement dated August 17; I will ask you if this statement, showing an application of payments made prior to that date came to your attention?

A. I will have to say the same as to all of these. I don't remember which of them came to my attention.

Q. I show you a list of statements here, or, rather, a loose file of them, and I will ask you if you recognize any of those statements as having been received by the Progressive Evaporator Company at or about the times that are shown upon the statements—the dates.

A. These are typical, and, so far as I know, are the same ones, many of which were discussed between Mr. Powell and myself, and between Messrs. Hine, Rees, and myself. You are asking me whether a certain statement was received on a certain date four years ago; I cannot testify to that. Statements like these came in. I assume they are the ones.

Q. When you say "statements like these," you mean either the originals or copies?

A. I would not say they were copies I cannot testify to that at this date. They look genuine enough, but I cannot testify about that. They have not been in my possession for over four years.

Q. I will show you again that statement of July 28, 1922, and I will ask you to look at that statement, referring, as it does, to payments theretofore

(Testimony of Norman Lombard.)

made by the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company, and the application of those payments, and I will ask you if that refreshes your recollection concerning your knowledge of how [139] moneys paid to the Rees Blowpipe Manufacturing Company were applied.

A. Now, do you want to ask me about this?

Q. I ask you the question, does that refreshen your recollection? Does that statement which I now show you refreshen your recollection as to whether or not you received information on or about July 28, 1922, as to how the Rees Blowpipe Company was applying the moneys which you had paid to it on account.

A. If I received this statèment, it would show how the money was being applied, yes; the statement shows it.

Q. And it shows that it was applied toward the manufacturing account of the Rees Blowpipe Manufacturing Company, does it not?

Mr. ERSKINE.—I object to that question, your Honor, on the ground that it calls for the conclusion of the witness.

The COURT.—Objection sustained.

Mr. BARRY.—Q. But you have no definite recollection of having received the statements, have you?

A. No.

Q. You recall the statements, or certain statements, that were produced before Judge Murasky, do you not?

(Testimony of Norman Lombard.)

A. I remember there were some statements produced, yes.

Q. Those statements were in your possession at that time, were they not, and they were produced by you?

A. No, I think not. The hearing before Judge Murasky was after the writ of mandate, after I turned over all the records, was it not?

Q. I don't remember that part of it. But is it not a fact that the statements I show you now were produced by you at the time the hearing was had before Judge Murasky?

A. I cannot say as to that.

Q. Now, as I understand your testimony, you at no time knew how the Rees Blowpipe Company was applying any of the payments which you made to it. Is that correct?

A. I don't recollect [140] that there was any knowledge on my part of how their books were being kept, or these payments applied, no.

Q. When statements came in, did you look at the statements to see how the payments were applied?

A. I don't remember that the matter was discussed at all. We just considered it as one lump account, and applied the money on that account.

Mr. BARRY.—I move to strike that out, your Honor, "we considered it as one lump account."

The COURT.—It is an explanation of why he does not remember. Let it stand.

Mr. BARRY.—Q. Do you state that up to the time that that controversy arose that you did not

(Testimony of Norman Lombard.)

know how many payments made by the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company were applied by that company?

A. I think the same answer will apply in that case, I have no recollection as to how any of these payments were applied.

Q. Did you not concern yourself as to how they were applied? A. No.

Q. Did you not look at the statements that came in to see how those statements showed they were applied?

A. I presume I did. I presume I looked at the statements, and as I examined photostatic copies of them recently they do not seem to show anything to me.

Q. Photostatic copies of what?

A. Of the statements.

Q. Have you got photostatic copies that you made of certain statements received by the Progressive Evaporator Company from the Rees Blowpipe Manufacturing Company?

A. Counsel showed me some photostatic copies of some statements, but they have not been in my possession.

Q. You referred a moment ago to certain photostatic copies of [141] statements. Have you any photostatic copies of statements received by the Progressive Evaporator Company from the Rees Blowpipe Manufacturing Company?

A. Counsel has some photostatic copies.

(Testimony of Norman Lombard.)

Mr. BARRY.—May I have them, Mr. Erskine? They are undoubtedly the same as these.

The COURT.—Do they show how it was applied?

Mr. BARRY.—Yes, your Honor, in every instance.

The COURT.—Then why waste any time on it?

Mr. BARRY.—I want to show these particular matters, your Honor, because they refer to the testimony of the witness.

The COURT.—If they had the means of knowledge, it was their duty to consult them. It is not very material that he says he did not know.

Mr. BARRY.—Q. I show you a photostatic copy of a statement dated July 28, 1922, and I will ask you if it is not a fact that that photostatic copy was made under your supervision, of a statement which you had in your possession at the time that it was made?

Mr. ERSKINE.—Do you mean at the time the statement was made?

Mr. BARRY.—That he had the statement at the time that the photostatic copy was made. That is all that means.

Mr. ERSKINE.—That is objected to, your Honor, upon the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained.

Mr. ERSKINE.—These photostatic copies were made, your Honor—

The COURT.—Never mind. The Court has ruled. Proceed with the examination.

(Testimony of Norman Lombard.)

Mr. BARRY.—Q. You knew, did you not, Mr. Lombard, that [142] the Rees Blowpipe Company's accounts showed a large indebtedness due from the Progressive Evaporator Company to the Rees Blowpipe Company for manufacturing plants. Is not that correct?

Mr. ERSKINE.—You are asking him if he knew the Rees Blowpipe Company's account showed.

Mr. BARRY.—I ask that the question be read.

(The question was here read by the Reporter.)

A. Their statements showed varying amounts due for various things, such as plants, extras, royalties etc.

Q. The Progressive Evaporator Company had no moneys on hand with which to meet these bills other than as moneys came in from notes upon contracts of sale of equipment. Is that not correct?

Mr. ERSKINE.—That is objected to on the ground that it is too general, and on the further ground that the books of the Progressive Evaporator Company, which are in the possession of the defendants, will show that.

The COURT.—Objection sustained.

Mr. BARRY.—Q. You know, do you not, Mr. Lombard, from statements received by you, or by the Progressive Evaporator Company, from the Rees Blowpipe Company, that the Rees Blowpipe Company claimed a large amount of indebtedness a large balance, for plants furnished to the Progressive Equipment Company practically at all times from April, 1922, up to November, 1922?

(Testimony of Norman Lombard.)

Mr. ERSKINE.—The same objection, your Honor.

The COURT.—Objection sustained. You will have an opportunity to make your defense later on if any is needed.

Mr. BARRY.—Q. Was there any payment ever made by you to the Rees Blowpipe Manufacturing Company, or to Rees and [143] Hine, which at the time that that payment was made was specified by you as a payment on account of royalties?

A. No, sir—

The COURT.—Just a moment. He has answered repeatedly that there was nothing said about the application. Don't repeat the testimony.

Mr. BARRY.—Q. I show you a bill dated July 24, 1922, upon the statement-head of the Rees Blowpipe Manufacturing Company, and I will ask you if that bill came to your attention at or about the date that it bears?

A. I don't know.

Q. Do you recall receiving a statement from the Rees Blowpipe Manufacturing Company on or about July 24, 1924, with reference to royalties due to Rees and Hine?

Mr. ERSKINE.—For the purpose of expediting this matter, I will admit, Mr. Barry these statements were delivered to the Progressive Evaporator Company at or about the time they purport to bear date. I think some of them bear the receipt of the Progressive Evaporator Company. Mr. Lombard

(Testimony of Norman Lombard.)

testifies that as far as he knows a great many of them did not come to his attention.

Mr. BARRY.—Q. All statements that were received, Mr. Lombard, came to your attention shortly after they were received, did they not?

A. I cannot testify as to that under oath, Mr. Barry.

Q. But you concerned yourself with statements that would come into the office from Rees and Hine, and from the Rees Blowpipe Company, and from other creditors, would you not? A. Oh, yes.

Q. And you were more or less familiar, from time to time, with the obligations of the Progressive Evaporator Company, were you not?

A. I endeavored to keep myself informed.

Q. You were in daily touch with Mr. Powell, the secretary and [144] bookkeeper of the company, were you not?

A. Practically so.

Q. You and he occupied the same office?

The COURT.—Well, I don't see any necessity for that kind of examination.

Mr. BARRY.—Very well, your Honor. I offer all of these statements in evidence and ask that they be marked defendants' exhibit next in order.

Mr. ERSKINE.—I don't think there will be any objection, but I want to look at them for just a moment, if your Honor will bear with me.

The COURT.—What purpose are they expected to serve?

Mr. BARRY.—To show the application of payments made by the Progressive Evaporator Company to the Rees Blowpipe Company as the payments were made.

The COURT.—You were at that point about fifteen minutes ago. They will be admitted.

(The documents were here marked Defendants' Exhibit "C.")

Mr. ERSKINE.—There is one of these I have not seen. Will your Honor bear with me for just a moment before I consent to the admission?

The COURT.—Very well. I don't see any necessity of any time being devoted to this particular matter. This witness was admittedly president then, and if he did not get the statements it was not the fault of these defendants, I assume.

Mr. BARRY.—Very well, your Honor. These may be considered as read?

The COURT.—Yes.

Mr. BARRY.—In that connection I offer also in evidence the six photostatic copies of checks payable to the Rees Blowpipe Manufacturing Company, drawn upon the account of the Progressive Evaporator Company, and ask that they be marked [145] defendants' exhibit next in order, and that they be considered as read.

(The documents were here marked Defendants' Exhibit "D.")

The COURT.—Proceed, if you have anything further of this witness that is material and proper cross-examination.

Mr. BARRY.—Yes, your Honor.

(Testimony of Norman Lombard.)

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The COURT.—Proceed, if you have anything further of this witness that is material and proper cross-examination.

Mr. BARRY.—Yes, your Honor.

(Testimony of Norman Lombard.)

Q. Mr. Lombard, you referred to a conversation which you had in the latter part of November, a which you say that Mr. Roche and I were present. You recall referring to that, do you not?

A. Yes.

Q. Is it not a fact that in substance I told you in that conversation that the Progressive Evaporator Company was indebted to the Rees Company in a large amount for royalties, or, rather, indebted to Rees and Hine in a large amount of royalties, and that Rees and Hine had concluded to cancel the license agreement?

A. I think nothing was said about royalties at that time, Mr. Barry. My report of that meeting is here, somewhere—I mean of the conversation.

Q. I don't care about your report, I want your testimony and your recollection at this time.

A. I would like to refresh my memory.

Mr. ERSKINE.—I submit to your Honor that he can refresh his recollection from a memorandum made of the conversation at the time.

A. (Continuing.) I don't recall anything about nonpayment of royalties being a part of that conversation.

Mr. BARRY.—Q. You won't say that that subject matter was not discussed in the course of that conversation, will you?

A. I should say, assuming that this was a report of the conversation, that it had not occurred, Mr. Barry, or I would have put it in. [146]

(Testimony of Norman Lombard.)

Mr. BARRY.—Your Honor, may I look at that?

A. (Continuing.) We were only together for a very few minutes walking up the street.

Q. In that conversation something was said about the right of a director legally to vote for himself as an officer of the corporation; you recall that being discussed, do you not? A. Yes.

Q. That was the position that you took before the Appellate Court, wasn't it?

Mr. ERSKINE.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained. Come down to what is material. Any further cross-examination?

Mr. BARRY.—Yes, your Honor.

Q. At the meeting on January 13, the reason why you were not present at that meeting was because you did not recognize that as a meeting. Is that not correct?

A. I don't think I knew any meeting was going to be held.

Q. You had not followed these meetings, or the dates to which they were postponed, anyway, had you? A. No.

Q. You have alleged in your bill of complaint here that Rees and Hine cancelled the license agreement at that meeting. You do not know of anything transacted at that meeting in the form of a resolution or otherwise—

Mr. ERSKINE.—Now, just a moment. That is

(Testimony of Norman Lombard.)

objected to, your Honor, as assuming a fact not in evidence.

The COURT.—Objection sustained. I don't care what is in the complaint, it is what is proved. Proceed.

Mr. BARRY.—Q. You knew, did you not, Mr. Lombard, that if Rees and Hine had a right to cancel the license agreement and saw fit to exercise that right they could do it just [147] as effectively as individuals and outside of the Progressive Evaporator Company as they could do it within the Progressive Evaporator Company. Is not that correct?

Mr. ERSKINE.—That is objected to as argumentive, and calling for the conclusion of the witness.

The COURT.—Objection sustained. Don't argue with the witness.

Mr. BARRY.—Q. You don't know, of your own knowledge, anything about what transpired at the Corporation Commissioner's Office, when you say that Rees visited there, do you?

A. I was not present.

Q. It is a fact, is it not, that on October 25, and referring to this matter of stock, that you caused the secretary in the night-time of that day to issue thirteen shares of stock to yourself and others. Is not that correct?

Mr. ERSKINE.—I object to the question as immaterial, irrelevant and incompetent, it is not an

(Testimony of Norman Lombard.)

issue in this case, and has been passed on by the other Court. If we get into this question, your Honor, as to whether or not he had the right to issue that stock, we will be wrangling about something that is immaterial here.

Mr. BARRY.—This is an equity case, and the question of good faith comes in, and I would like to open up the door on this particular situation.

The COURT.—No. The only question is whether these defendants have wronged the corporation. If he brings in testimony enough to show that the corporation has been wronged, he will be entitled to relief, regardless of his good or bad faith. So far as his honesty is concerned, some things may be shown. I think it will come up in your case, if at all.

Mr. BARRY.—I would like to go into this one phase of it, [148] your Honor.

The COURT.—I don't understand that on direct examination he has made any claims based on those shares. It is not proper cross-examination. Proceed with your cross-examination.

Mr. BARRY.—Q. It was in Judge Murasky's courtroom, was it not, in the trial of the proceeding before Judge Murasky, that you heard Mr. Hine testify that the license agreement had been cancelled. Is not that correct?

A. That is my recollection.

Q. No action was taken by you in that particular until this action was commenced sometime later in

(Testimony of Norman Lombard.)

the federal courts. Is not that correct? No action of any kind was taken by you with reference to that cancellation?

A. Definitely with respect to that, or in anticipation of this being done, do you mean?

Q. After you heard from Mr. Hine, in his testimony, that the cancellation had taken place, did you do anything *anything* up to the time you instituted the suit in the federal court?

A. Did I do anything? I don't know what you mean.

Q. Did you attend any meetings, or did you find out whether there was any meeting of the board of directors of the Progressive Evaporator with reference to that subject matter?

A. I found out that there was nothing being done at the Progressive Evaporator Company's office. I found out that Mr. Neal was running a business with an office out at the Loew Theater Building, a dehydrator business.

Q. Is it not a fact that on receiving that information you saw the minutes of the Progressive Evaporator Company and learned what had transpired at its meetings?

A. Can you refresh my memory as to that, Mr. Barry? [149]

Q. I cannot. I am asking you if you have any memory concerning it?

A. I have not. It is four years ago, Mr. Barry, and I don't want to be tricked into making some

(Testimony of Norman Lombard.)

statement; if you have knowledge of my having seen those minutes, suggest it to me.

The COURT.—He has answered the question. Proceed.

Mr. BARRY.—Q. Who was the sales manager of the Progressive Evaporator Company and made these sales, that is, who handled the sales on the outside? .

A. Mr. Neal was the sales manager, but we all helped making sales during the selling period.

Q. How many did you make?

A. Mr. Neal is an exceedingly efficient salesman, much better than I am.

Q. And it is a fact that the plants were sold by him, is it not, or under him?

A. Not entirely, I sold some plants—some plants that he probably could not have sold, if you want that information.

Q. You recall that there was a period of a week from the time that the thirteen shares of stock were issued up to the time that you had a stockholders meeting called to remove the Board of Directors, during which you sent the secretary of the corporation to Los Angeles, do you not?

Mr. ERSKINE.—Now, your Honor, we are going to get into another wrangle.

The COURT.—Have you any objection?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Then make it.

Mr. ERSKINE.—I object to the question as

(Testimony of Norman Lombard.)

immaterial, irrelevant, and incompetent, and not proper cross-examination.

The COURT.—The Court understands that this has been tried and determined before. [150]

Mr. BARRY.—The only prejudice I suffer, may it please your Honor, is the fact that it was gone into on the direct examination of the witness and should be allowed to go into it now.

The COURT.—Objection sustained. If you had objected in time it would not have been gone into. If you had made it known to the Court that there was a judgment in the matter, it would not have been gone into. Proceed.

Mr. BARRY.—I think that is all.

The COURT.—Any redirect?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Be brief with it.

Redirect Examination.

Mr. ERSKINE.—Q. Referring to the mandamus served upon you and the demand for the books, did you have a conversation with Neal and Hine at that time when they came to get the books?

A. Yes.

Q. Did you make a memorandum of that conversation? A. Yes.

Q. Is this the memorandum?

Mr. BARRY.—Let us see first whether he can testify to it without the memorandum. We object to the question, your Honor, on that ground.

The COURT.—Objection sustained.

(Testimony of Norman Lombard.)

Mr. ERSKINE.—Q. Are you able to state what the conversation was without the memorandum?

A. Only in a general way; I would like to refresh my memory.

Mr. ERSKINE.—I will ask that he be allowed to refresh his memory from the document that he made, and then state what was said.

Mr. BARRY.—I object to the subject matter of the question as immaterial, irrelevant, and incompetent. [151]

The COURT.—What is the object of this?

Mr. ERSKINE.—The object is to show that Mr. Lombard at that time warned them against taking away the license, and against a violation of this license. That was on the 8th of February. It shows that he did not know at that time that it had been cancelled. He warned them that they must look out for the interest of the corporation.

The COURT.—The question is did they or did they not look out for it? It would not make any difference whether they got a warning, or not.

Mr. ERSKINE.—He was asked, your Honor, whether he had made any investigation.

The COURT.—And you did not object to it. The issue is, did they fail to serve the interests of the corporation. If you prove that you don't have to prove these incidental conversations and warnings.

Mr. ERSKINE.—Q. You were asked whether you made any investigation: What investigation did you make before you commenced your suit to as-

(Testimony of Norman Lombard.)

certain whether or not the interest of the corporation were being served, as a prerequisite to commencing your action?

Mr. BARRY.—That is objected to, if your Honor please, as calling for the conclusion of the witness and as immaterial, irrelevant and incompetent.

The COURT.—The objection is sustained.

Mr. ERSKINE.—Q. What did you do when you ascertained from Mr. Hine's testimony sometime in February of 1922, that there had been a cancellation, what did you do then?

Mr. BARRY.—The same objection, your Honor.

The COURT.—Objection sustained. He brought this suit in due time, as far as the Court sees; if he proves his case, [152] that is all that is necessary. Objection sustained. Proceed.

Mr. ERSKINE.—Q. You were asked on cross-examination if you knew that Rees and Hine were to share share and share alike in these royalties, and you said you did know that, and you were asked to explain what your knowledge was, and you wanted to make some explanation in connection with your answer. Will you state now what you intended to say at that time with respect to your knowledge?

Mr. BARRY.—I object to the question on the ground that is immaterial, irrelevant, and incompetent, and goes into matters of conclusions.

The COURT.—We will hear what he has to say. The case is being tried before the Court. Let him answer the question. I assume it is something material.

(Testimony of Norman Lombard.)

A. What is the question, Mr. Erskine?

Mr. ERSKINE.—Q. You were asked whether or not you knew Rees and Hine were to share share and share alike in these royalties, and you said you did know, and you asked leave to explain your answer, and the Court suggested that that could be brought out on redirect.

A. Somewhere along at that time it occurred to me that Rees and Hine were not the real patentees, that the patent had been issued to the Rees Blowpipe Manufacturing Company, and whether I assumed, or whether I had noticed, or just why it was, that we did not pay the royalties to Rees and Hine, and the manufacturing account to the Rees Blowpipe Manufacturing Company, was based on that knowledge, or assumed knowledge, that I had at that time that the Rees Blowpipe Manufacturing Company was the real patentee.

Q. As a matter of fact, the main patent in this case was assigned by Claude Rees to the Rees Blowpipe Manufacturing Company, [153] was it not?

Mr. BARRY.—I object to that question, your Honor, because it includes the word “main.” You might say, one of the patents.

Mr. ERSKINE.—All right. One of the patents was assigned to the Rees Blowpipe Manufacturing Company by Claude Rees.

A. The only issued patent, so far as I knew of at that time.

Mr. ERSKINE.—You will admit that this is a

(Testimony of Norman Lombard.)

photostatic copy of the patent, itself, reciting the assignment?

Mr. BARRY.—I assume that is correct. I will make the admission subject to any correction that may be made.

Mr. ERSKINE.—I offer this in evidence.

The COURT.—Admitted. I understand it is admitted in the pleadings.

(The document was here marked Plaintiff's Exhibit No. 4.)

Mr. ERSKINE.—Q. It was some time before you found out about that assignment, was it not?

A. Some time after the execution of the license agreement, you mean?

Q. Yes. A. Oh, yes.

Q. That is the explanation that you *with* to make to the Court that you heard about that time, or some time during that period, of this assignment of the main patent—not the main patent, but of the only patent, by Rees to the Rees Blowpipe Manufacturing Company? A. That is correct.

Q. Were any statements ever rendered you, or the corporation, as far as you know, by the Rees Blowpipe Manufacturing Company, or I should say, by Rees and Hine, on anything but the Rees Blowpipe Manufacturing Company's stationery and letter-heads, for these royalties?

A. No, I have no recollection of any.

Q. And, as far as the books of this corporation were concerned, [154] the Progressive Evaporator Company, were the Rees Blowpipe Com-

(Testimony of Norman Lombard.)

pany's accounts and the Rees and Hine account carried separately, or were they all carried in one account?

Mr. BARRY.—I object to the question on the ground that the books are the best evidence.

Mr. ERSKINE.—I propose to show that subsequent to the commencement of this action a new account, a royalty account, was added to these books.

Mr. BARRY.—The books, at the time we got them, Mr. Erskine, and from that time forward, are not interfered with in any respect, whatsoever, and anything there is an addition, and not a change.

Mr. ERSKINE.—That is exactly what I said.

The COURT.—Read the question.

(Question read by the reporter.)

Mr. BARRY.—I object to the question as immaterial, irrelevant, and incompetent, and the proper foundation has not been laid.

The COURT.—The objection is overruled on that ground.

A. It was all kept in one statement, royalties, and plant, and extras, and various credits back and forth.

Mr. ERSKINE.—Q. They were dealt with, then, as one debtor, were they not?

Mr. BARRY.—I object to the question as calling for the conclusion of the witness.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Whenever Rees or Hine

(Testimony of Norman Lombard.)

came up to get money, did they discuss the entire indebtedness?

Mr. BARRY.—That is objected to as too general in form, and no foundation has been laid.

The COURT.—Objection sustained. [155]

Mr. ERSKINE.—Q. How did Rees and Hine collect these moneys and these checks that have been referred to?

A. They would bring in these statements of the Rees Blowpipe Company showing how much they had due, and collect as much cash as we were able to give them. Sometimes they would collect notes that is to say, notes we had received in payment of plants.

Q. They would bring in a statement and collect these moneys? A. Money and notes.

Q. And these statements that have been referred to by Mr. Barry, and introduced in evidence as Exhibit "C," or statements similar to those, were brought in, and these moneys and notes, given to them? A. Yes.

Q. Did they come together each time, or did Mr. Rees come on one occasion and Mr. Hine on another?

A. They came together every time that I can recall except once.

Q. When was that last time?

A. I think that was the last payment we made when I delivered to Mr. Rees a large quantity of notes, \$20,000 or \$30,000 worth of notes, I forgot just how much.

(Testimony of Norman Lombard.)

Q. Do you recollect what was said at that time?

A. He said he wanted cash, and I told him how much cash we had, and showed him the needs for the cash. I showed him the notes. Finally he said, "Give me those notes," and he walked out.

The COURT.—Anything further? Call your next witness.

Mr. BARRY.—Your Honor, I have one matter in rebuttal I would like to ask him about.

The COURT.—About what?

Mr. BARRY.—Covering the matter gone into on redirect. I want to call his attention to one or two statements that [156] he at first denied seeing them.

The COURT.—You have had your full right of cross-examination. He has answered fully on those matters. Call your next witness.

TESTIMONY OF CHARLES HINE, FOR PLAINTIFF.

CHARLES HINE, called for the plaintiff, sworn.

Mr. ERSKINE.—I am going to ask, your Honor, for leave to cross-examine Mr. Hine under Section 2055 of the Code of Civil Procedure of the State of California.

The COURT.—Very well, but see to it that it is material and brief.

Mr. ERSKINE.—Q. What was your position in respect to the Rees Blowpipe Manufacturing Company in the years 1922 and 1923?

A. Vice-president.

(Testimony of Charles Hine.)

Q. And the Rees Blowpipe Manufacturing Company consisted of Rees and Hine, did it not?

A. They were the principal stockholders.

Q. It is a fact, is it not, that at the time of the trial in Judge Murasky's court you testified—do you think you will agree on this statement—that Rees and Hine were practically the Rees Blowpipe Manufacturing Company? A. Yes.

Q. And that is a fact, is it not? A. Yes.

Q. What was your relation with respect to the Progressive Evaporator Company?

A. You mean in that same year?

Q. Yes. A. Director.

Q. And you became secretary, did you not, on the 1st of November? A. Yes.

Q. Thereafter you were secretary and director of the Progressive Evaporator Company?

A. Yes, sir.

Q. And you were also one of the parties to the license agreement, [157] you were one of the patentees, were you not? A. Yes, sir.

The COURT.—All that stands admitted before the Court.

Mr. ERSKINE.—Very well, your Honor.

Q. You were the secretary and director when this agreement was cancelled, were you not?

A. Yes, sir.

Q. And you were also the secretary when the resolution which has been introduced in evidence was sent to the Crocker National Bank?

A. Yes, sir.

(Testimony of Charles Hine.)

Q. Certain statements have been introduced in evidence here, and I want to call your attention to them. On September 4 and September 5, on those statements, do you recollect bringing these statements to the office of the Progressive Evaporator Company? A. No, I could not do that.

Q. You do not recollect that? A. No.

Q. Do you know how they got there?

A. Generally speaking, I know that Mr. Rees and I at different times took statements up there, but I could not tell you which one or when.

Q. You took statements up there, and you got moneys and notes, did you not? A. Yes, sir.

Q. Do you recollect receiving at that time, or prior to the rendition of this statement on September 4, 1922, \$29,863 worth of notes and cash which were credited on account, according to this statement?

A. I remember the notes being transferred to our care.

Q. I call your attention to the fact that on the debit side of this account there appears as one of the items making up a total balance of \$50,769.59; royalties on plants built to date, \$5,775. That is on this statement of the Rees Blowpipe Manufacturing Company, is it not? A. Yes, sir.

Q. And do you recollect that on the credit side there appear items amounting to \$29,863.88, showing a balance of \$20,095.71. [158] That statement was rendered at the time, was it not?

A. About that time, yes.

(Testimony of Charles Hine.)

Q. When did you notify anybody in the Progressive Evaporator Company, the Board of Directors, or the secretary, or the president, that that \$29,000 had not been applied to any of the \$5,775 royalties that were on that statement? When did you first notify them of that?

A. Previous to the time of taking the notes.

Q. What notes?

A. Those notes that you mention there as summing up to about \$29,000.

Q. Then why didn't you put it on this statement if you did that?

A. I don't quite understand you.

Q. You say that you notified them that the \$29,863.88 was not to be applied to royalties, but to the balance of the indebtedness. I asked you then why you did not put it on this statement of September and on September 5.

Mr. BARRY.—I object to the question upon the ground that no foundation has been laid showing that this witness testified that those notes were taken as payment at all. There is no such testimony.

Mr. ERSKINE.—He said that there was a conversation, that this \$29,863 was not to be applied, any of it, on account of this royalty indebtedness, which was a part of the statement rendered.

The COURT.—A conversation where, and with whom?

Mr. ERSKINE.—And he said it was prior to the rendition of the statement.

(Testimony of Charles Hine.)

The COURT.—Objection overruled. Answer the question.

A. I will have to know what the question was.

The COURT.—Repeat the question.

Mr. ERSKINE.—Q. I asked you why, if you had a conversation with the officers of the Progressive Evaporator Company [159] that that \$29,863.88 which was received on account of the total indebtedness of \$50,000 odd, which included the balance of \$5,775 royalties, if you had that conversation that it was to be applied not on the royalty account, why didn't you apply it on that statement.

Mr. BARRY.—I object to the question on the ground that the statement shows that the \$29,000 is not for notes at all, but for other payments that were made from April up to the date that this statement bears.

The COURT.—Let the witness answer the question. Objection overruled. If you have any answer to make, make it.

A. The question is so complicated that I cannot answer it intelligently. I don't know what the point is that I am to answer.

The COURT.—Neither do *it*.

Mr. ERSKINE.—Q. All right. Let us get at it this way. I asked you, referring to your statement, when did you first notify any officers or directors of the Progressive Evaporator Company that that \$29,863.88 which was received up to September 1st on account of the indebtedness, I want to know when you first told them that none of that was

(Testimony of Charles Hine.)

applied on the royalties. You said to me that you told them prior to the rendition of that statement. Then I asked you, "Well, if you did that, why didn't you put it on the statement." Now, is that clear?

A. The point that confuses me is this, that you mention this sum as though they were a bunch of notes; you mention the \$29,000 as though it were a lot of notes.

Q. I mention it as credits.

A. That is where you confused me, because we did take a lot of notes, and I said then that we did not apply them that way.

Q. When did you, after September 4, 1922, first notify the [160] directors of the Progressive Evaporator Company, or the officers, that the \$29,863.88 credits there had not been applied on any of the royalty account?

A. I will have to guess at the date, but I think it was around the date of this other statement, October 6th or thereabouts, when we were still discussing the notes.

Q. And prior to that time you did not tell them that the royalty account of \$5,775 had not been paid? A. Yes, we did.

Q. You did? A. Yes, we did.

Q. When did you make that statement?

A. I am of the opinion now, as well as I remember, that in every discussion about the moneys to be paid that point was brought up.

Q. What was said?

(Testimony of Charles Hine.)

A. One of the things that was said, if you will refer to the time there when we took all of the money, Mr. Neal and Mr. Lombard both objected to the amount of notes that we were taking, because it was greater than what was owed the Rees Blowpipe Company on the material account.

Q. And what was said?

A. Nothing was said at that time, or no objection was raised at that time, nor did they ever say to Mr. Rees and I that part of that money was to pay on the royalty account.

Q. Did you ever call it to their attention when you had taken notes in excess of what was due the Rees Blowpipe Manufacturing Company, that the balance of it was not to go on their royalties, did you ever call that to their attention? A. Yes.

Q. When?

A. At these different times when we were discussing these bills, as you will note the dates of the bills there. I cannot tell you any particular date.

Q. I call your attention to the fact that this bill of September 4 and of September 5 does not state or show that the [161] royalties of \$5,775 were not to be paid by the \$29,863 of credits; are you sure that you discussed it with them at that time?

A. No, I could not be sure of that certain date.

Q. Is it not a fact that it was never called to the attention of the Board of Directors, or to the attention of either Mr. Neal, or Mr. Rees, or Mr. Lombard, or Mr. Powell, except as may have appeared in the statement of October 6th, that you

(Testimony of Charles Hine.)

were holding these royalties open and not taking any of these moneys for royalties?

A. Yes, it was.

Q. When?

A. Previous to that time; I could not give you any specific date.

Q. What was said? Was that at a directors' meeting?

A. In a full assemblage of directors.

Q. Was it ever at a formal directors' meeting taken up and passed upon? A. No, sir.

Q. What was said when it was discussed?

A. At one time we were discussing taking these notes over for the accounts, and the point at issue about the patents was brought up in this way, that if Mr. Lombard could not raise money and pay us, that if the worse came to the worst, as I put it once before, we would take the long-term notes as payment on the royalties.

Q. Take the long-term notes, the notes of the Progressive Evaporator Company?

A. Yes, a part of those notes that were under discussion.

Q. You refer to notes which purchasers had given the Progressive Evaporator Company, do you?

A. Yes.

Q. And did you state that you were willing to take those long-term notes on account of the royalties? A. At one time we did, yes.

Q. When was that?

A. I cannot give you a specific date.

(Testimony of Charles Hine.)

Q. Was it after the statements of September 4 and 5, was it [162] after those statements were rendered, or was it before?

A. I cannot tell you.

Q. You stated, as I understand it, that if the worse came to the worst you were willing to take the long-term notes of purchasers. A. Yes.

Q. You had them.

A. At different times we had them, but at other times Mr. Lombard would take them away again.

Q. You stated you would be willing to take the long-term notes on account of the royalties?

A. Yes, sir.

Q. As I understand you, you also say that when you got the last batch of notes, in October, 1922, just before this row started, that that over paid—taking the face value of those notes—the manufacturing account completely.

A. Taking the face value of the notes, it did.

Q. After this row occurred, did you ever at a Board of Directors, meeting demand your royalty?

A. No, sir.

Q. You never did?

A. Not to my knowledge.

Q. Did you ever state that you were not willing—did you ever state to them after that time, after the row occurred, or before, that you were not willing to take the long-term notes? A. No, sir.

Q. Did you ever make a written demand on the Board of Directors for the royalty that was due you

(Testimony of Charles Hine.)

and advise them that you would cancel the agreement if it was not paid?

A. I don't believe we did.

Q. And the first notice that was given the Board of Directors as far as you know, that you contemplated cancelling the contract and not accepting the long-term notes, was the notice that was delivered to Mr. Neal at the meeting on January 13?

A. I think so.

Q. And at that time only Neal, the president, and you, the [163] secretary, and Hine were present?

A. And Mr. Rees.

Q. Yes, I mean Mr. Rees. A. Yes.

Q. The statements of September 4 and 5 show that you had received \$29,863 up to that time. The statement of October 6th shows, and I will take the liberty of calling these to your attention—it shows that there was an increased indebtedness of \$6,674.39—

Mr. BARRY.—Just a moment, Mr. Erskine. That does not include royalties, at all, does it?

Mr. ERSKINE.—No, it does not.

Q. (Continuing.) And it shows certain credits of \$593.26. After that you took a big bunch of notes didn't you? A. Yes, sometime after that.

Q. Quite a lot of them. A. Yes.

Q. They amounted to practically \$30,785.

A. I don't remember the figures, but I know we took a lot of notes.

Q. And it was that last amount of notes which

(Testimony of Charles Hine.)

you say overpaid the Rees Blowpipe Company's account, if you take them at their face?

A. Yes, as I remember it.

Q. Leaving a balance applicable to any other indebtedness—

Mr. BARRY.—Now, just a moment, don't lead the witness.

Mr. ERSKINE.—All right, your point is well taken, I should not have asked the question that way.

Q. Did you take, and had been in the habit of taking these notes as actual payment?

A. Only the ones we chose to take that way.

Q. When did you notify them that you chose to take them as payment and not as collateral?

A. In the office of Mr. Lombard we were discussing how he was going to pay these bills, we had looked over the notes with him and told him we would take notes that we realized were good ones, and that we could get [164] ready cash on them, we would agree to take them as payment.

Q. According to these statements, you took certain notes as payment, such as the Stiles note?

A. Yes, and there were several others.

Mr. BARRY.—Q. They were all credited as payments, were they not?

A. Yes. They were short-term notes, notes that we could readily cash at the bank.

Mr. ERSKINE.—Q. When you got these notes from time to time, and this cash, did you make any division of them at all between you and Mr. Rees?

(Testimony of Charles Hine.)

A. At one time he and I did make some division of certain notes that we had.

Q. You did make some division of certain notes that you had? A. Yes, sir.

Q. What were those notes?

A. I cannot tell you.

Q. And you made a division of them on account of royalties, did you not?

A. Yes, because he had had that discussion with Mr. Lombard previous to that time.

Q. Did you make any division of cash received on account of royalties? A. No, sir.

Q. You just made the division of the notes?

A. Yes, after that discussion.

Mr. BARRY.—Do you mean as payment of royalties, Mr. Erskine?

Mr. ERSKINE.—Yes, that is what I asked him.

Mr. BARRY.—Mr. Hine entirely misunderstands you, I am sure.

The COURT.—Just a moment. You will straighten that out later on. Let counsel proceed.

Mr. ERSKINE.—Q. This division you made a record of, did you not?

A. Not to my knowledge.

Q. Did you not keep a record of the division of those notes [165] in a book?

A. Not to my knowledge.

Q. You know whether you kept them?

A. Not necessarily, no.

Mr. BARRY.—Mr. Rees knows about that.

(Testimony of Charles Hine.)

Mr. ERSKINE.—Q. Didn't you have a little book in which that appeared?

A. I have seen the book, and talked of it being in there, but I have never personally seen it in the book.

Q. Talked of what being in there?

A. The record of the notes.

Q. And that book was a book which represented the royalty account of you and Mr. Rees, was it not?

A. If I may answer the question this way, it was some record that our bookkeeper was keeping. Mr. Rees had talked to her about it. I had never seen it.

Q. There was a record being kept of certain notes received from the Progressive Evaporator Company which were being kept in a royalty account? A. Never to my knowledge, Mr. Erskine.

Mr. ERSKINE.—Where is this book?

Mr. BARRY.—We have the book.

The COURT.—Proceed with the witness.

Mr. ERSKINE.—I want to get at this point—

Mr. BARRY.—These matters can be taken up with other witnesses, your Honor, if counsel wants to.

Mr. ERSKINE.—Q. You did receive certain notes from the Progressive Evaporator Company?

A. Yes.

Q. And you took them in compliance with your discussion with Mr. Lombard, which was a discussion wherein you said you were willing to accept

(Testimony of Charles Hine.)

the long-term notes for the royalty, and you took them and noted them in some book.

The COURT.—He answered that he did not. If you want to interrogate the witness on something he knows something about, proceed to do so, but do not go over that ground again. There [166] is a limit as to how long we will give to this case as well as any other. The time will be as much as necessary, but not as much as counsel might desire. Proceed, if you have anything further, as the Court has directed you.

Mr. ERSKINE.—Q. You did not cause any of those entries to be made in that book, yourself?

A. I did not.

Q. Do you know the notes which were referred to in that book? A. No, sir, I do not.

The COURT.—He told you repeatedly he did not. The Court has directed you once, and will not direct you again, in the matter of pressing this witness on matters that he has already said he has no knowledge of. Anything further with this witness?

Mr. ERSKINE.—Yes, your Honor.

Q. After you became the secretary of the company, on November 1st, did you attempt to discount any of the other notes of the company? Was anything done to secure money to pay the royalties due you, or which you claimed on this indebtedness?

A. No, nothing done.

Q. You took no steps whatsoever to secure

(Testimony of Charles Hine.)

moneys from the properties of the company, did you, with which to pay this indebtedness?

A. No. If you will let me answer that and explain it a little I will. The reason we did not try to discount any notes was because we were stopped at every move.

Mr. ERSKINE.—I move to strike that out on the ground that it is not a responsive answer. I asked him if he made any attempt. The other matter can be brought out on cross-examination.

The COURT.—Yes, objection sustained.

Mr. ERSKINE.—Q. The fact remains that no attempt—

The COURT.—He has answered that. Don't go back to it again. [167]

Mr. ERSKINE.—Q. After this controversy and dispute arose between Lombard and Powell, on the one side, and you, and Rees, and Neal, on the other, did you have any discussions with Neal with respect to cancelling this license agreement, and giving him a similar license agreement to operate under individually, or as a partner of a Mr. Ward?

A. I think sometime afterwards it was discussed, yes.

Q. When did those discussions begin?

A. I cannot tell you.

Q. Is it not a fact that they began at the very time, practically, from the time the row started?

A. No, sir.

Q. You are sure of that, are you?

A. Absolutely.

(Testimony of Charles Hine.)

Q. Did you testify before Judge Murasky as follows:

“Q. When did you have the first conference with Neal with reference to this cancellation?

“A. As I tried to explain to you, you cannot get me to say any certain time, because there have been discussions about the cancellation of this from the very time the fight started.

“Q. From the very time the fight started?

“Yes.

“Q. Discussion with whom?

“A. Among ourselves.”

Did you so testify before Judge Murasky?

A. I did.

Mr. BARRY.—You are referring to giving a new agreement, Mr. Erskine?

Mr. ERSKINE.—No, I asked him when the discussions occurred with Neal.

The COURT.—Proceed.

Mr. ERSKINE.—Q. What was said in those discussions about cancelling the license?

A. That from the action Mr. Lombard was taking in the matter, we did not believe we would ever be able to operate under the present company, and that in order for us to operate and keep our product before the people we would have to cancel that license agreement and work otherwise. [168]

Q. Was it stated to Neal that you would work with him and give him a similar agreement?

A. I think so.

Q. And those discussions about Neal getting that

(Testimony of Charles Hine.)

agreement started about the time the fight commenced? A. No, sir, I differ with you on that.

Q. Who is Mr. Ward?

A. A gentleman that Mr. Neal introduced to us sometime afterwards as a man who might be interested in it.

Q. After what? A. After the trouble started.

Q. As a matter of fact, Mr. Ward was present, was he not, at the hearing before Judge Murasky in November and December, and January and February? A. I think Mr. Neal had him up there.

Q. He was present, wasn't he?

A. I believe so.

Q. And it was being considered, was it not, that he would take over this license when you cancelled it and took it away from the corporation?

A. Mr. Neal was dealing with Mr. Ward, I was not.

Q. Is it not a fact that you and Mr. Rees were looking into Mr. Ward's financial responsibility at that very time? A. I won't say at that time.

Q. When did you start to look into his financial responsibility?

A. Sometime later, when we were interested in it.

Q. At the time this notice was served on Mr. Neal, did Mr. Neal make any objection, this notice cancelling this license, on the 12th or 13th, did Mr. Neal, the president, make any objection at that time to the cancellation of it?

A. I do not believe he did.

(Testimony of Charles Hine.)

Q. And at that time you did have an arrangement with him that the license would be cancelled and he would go on and operate under it with the Dehydrator Company?

A. I won't say it was a definite arrangement
[169]

Q. Do you recollect testifying before Judge Murasky as follows:

“The COURT.—Q. I suppose you three got together and said if things did not turn out right you would cancel the agreement?”

“A. Yes.

“Q. And start all over. A. Yes.

“Q. What was Mr. Neal to receive out of this new stock?

“A. Not any more, I would say, than he had received by entering into the proposition as he did with the Progressive Evaporator Company, Inc.

“Q. But he was to receive something?

“A. We were willing, of course, as men who have stood together at all times, to see that Neal got a position somewhere, got the interest that he had before.

“Q. He said the same interest that he had under the corporation, practically. A. Yes, sir.

“Q. Is that the situation? A. Yes, sir.

“Q. And that had been promised Mr. Neal?

“A. Not necessarily promised, it was just the arrangement you would naturally go into.

“Q. That is the understanding between you Gentlemen. A. Practically, yes.”

(Testimony of Charles Hine.)

You did have some sort of an understanding at that time, did you not?

A. I explained a while ago that we discussed it all the time.

Q. From the very time the row started?

A. No, I think it was quite a time afterwards that we started to figure on some way of handling it.

Q. And you did have some sort of an understanding, whether you considered it an agreement, or not, you had an understanding that the license would be cancelled, and that this new company [170] would be formed, and that Neal, the president of the old company, would have the new license?

A. We were working within what we thought were our legal rights at that time, to make some move of that kind, yes.

Q. You were working with him? A. Yes.

Q. And he agreed to it? A. Yes.

Q. And he was in accord with you?

A. Oh, yes, he was the one who was trying to get us to do it.

Q. And you did it? A. Yes.

Q. Have you the agreement which you made with Neal and Ward?

A. I think Mr. Barry has a copy of it.

Mr. BARRY.—I think I can find it.

The COURT.—Well, if you have not got it, proceed, unless you have given notice to produce. You must prepare your case out of court, and not in court. If you had given a notice to produce they would have it ready for you.

(Testimony of Charles Hine.)

Mr. ERSKINE.—I have given a notice to produce, and also have served a subpoena.

The COURT.—Very well, let it be produced.

Mr. BARRY.—I have it here among my papers, your Honor. I think this is it, February 4, 1923.

Mr. ERSKINE.—I have never seen this agreement. Will your Honor give me an opportunity to examine it during the noon hour? It is quite long, it is about five or six pages long.

The COURT.—Yes.

Mr. ERSKINE.—Q. In the meantime, Mr. Hine, after this cancellation notice was given, were any orders taken by the Progressive Evaporator Company which you were the secretary or for the manufacture of any plants? A. No, sir.

Q. But orders were taken by the Pacific Dehydrator Company [171] thereafter, were they not? A. I never knew a company by that name.

Q. The Progressive Dehydrator Company.

A. They took some after that time.

Q. They took some the following year, didn't they? A. Yes.

Q. And, as far as the Progressive Evaporator Company is concerned, after November 1st, when you became secretary, no orders were taken?

A. No.

Q. And no sales were made? A. No.

Q. During the existence of the Progressive Evaporator Company's activities, and prior to the cessation of activities around November 1st, they had

(Testimony of Charles Hine.)

secured certain prospects and lists of prospects, had they not? A. I cannot tell you.

Q. Do you recollect Mr. Lombard having a conversation with you on February 8, 1923, when you went to get the books and records of the corporation? Do you recollect that? A. Yes, sir.

Q. Do you recollect him saying to you, "I am turning over to you letters from prospective purchasers, and a file of correspondence with prospective purchasers, and these are the property of the Progressive Evaporator Company, and I am turning them over to you as directors of that company, if any profits are made from selling evaporators to these people these profits will belong to the company and you will be held responsible for the same, and you are expected to show the highest degree of trust." Do you remember that? No.

Q. Nothing of that kind was said to you?

A. No.

Q. Those prospects were taken, were they not?

A. Yes.

Q. And they were afterwards turned over to Mr. Neal, were they not? A. No, sir.

Q. He used them, didn't he? A. No, sir.

[172]

Q. And sales were made to those prospects?

A. Yes.

Q. They were?

A. Yes, because he went out in the field and worked among those people.

(Testimony of Charles Hine.)

Q. He went out and worked in the field and he made sales for this other company, didn't he?

A. Yes. He was sales manager of the other company, and he knew of those. As secretary I kept those under my care. I never turned them over to anybody.

Q. But as president of the company he knew about them, did he not? A. Absolutely.

Q. And he made sales to them? A. Yes.

Q. And the result was that you sold 50 evaporators during the following year?

A. I think Mr. Neal and Mr. Ward did, yes.

Q. And the advertising, and the proselyting that the Progressive Evaporation Company did in the previous year helped the sales by the Progressive Dehydrator Company, did it not?

Mr. BARRY.—I object to that question, if your Honor please, upon the ground that it is immaterial.

The COURT.—Objection sustained. Anything further? If not, the other side may examine.

Mr. ERSKINE.—I have one more question to ask.

The COURT.—Be brief with it.

Mr. ERSKINE.—Q. Do you recollect that on October 27 or thereabouts, when the row started, Mr. Lombard stated that he was willing to be eliminated as president of the company if he could get the assurance from you and Mr. Hine that you would not do anything to jeopardize the license agree-

(Testimony of Charles Hine.)

ment? I should say Mr. Rees. Do you recollect that?

A. Not in the words that you state it in, no.

Q. Do you recollect that he stated that he was distrustful [173] that two of the directors, combined with the president of the company, were trying to get the control away from him when they had an interest adverse to the corporation?

A. No, not two of the directors combined with the president of the company.

Q. Do you recollect Mr. Lombard, at the very outset of the controversy, saying to you, "I think that the suggestion which I have offered is in line; you, Gentlemen, contemplate certain definite actions that you want to hold the meeting for, and you have it programmed, and if those are legal and proper there is no reason why you should not place those on paper, and this very likely pertains to my elimination"—

The COURT.—Just a moment, just a moment; I cannot see why all of these conversations should come in, I cannot see the materiality of them.

Mr. ERSKINE.—The only point I want to call attention to is the fact that Mr. Lombard, at the very inception, was afraid—

The COURT.—What is the difference what Lombard was afraid of? If you show that these people were at fault, you will get your decree, whether Lombard was afraid of them, or whether Lombard was standing in with them, so far as that goes. Proceed.

(Testimony of Charles Hine.)

Mr. ERSKINE.—I think that is all with this witness.

The COURT.—Cross-examine.

Cross-examination.

Mr. BARRY.—Q. Counsel showed you statements, Mr. Hine, rendered by the Rees Blowpipe Manufacturing Company to the Progressive Evaporator Company; do you recall the statement of July 24, 1922, rendered upon the statement-head of the Rees Blowpipe Manufacturing Company, being delivered to the Progressive Evaporator Company?

A. Well, yes, it is very familiar to me. [174]

Q. This is on the statement-head of the Rees Blowpipe, but it says "Royalties due Mr. C. Rees and Mr. Charles Hine on plants shipped to date." Was there ever any conversation at any time with Mr. Lombard or anyone else, in which he was told that he could pay royalties to the Rees Blowpipe Manufacturing Company? A. No, sir.

Q. I show you a statement dated July 28, 1922, showing the application of all payments received up to that date as having been applied toward manufacturing plants. Was that statement rendered to the Progressive Evaporator Company?

The COURT.—They admit that.

Mr. BARRY.—All right, your Honor.

Q. Counsel referred to a statement of September 5, as including an item of royalties in an account of the Rees Blowpipe Manufacturing Company.

(Testimony of Charles Hine.)

When was the next statement rendered by the Rees Blowpipe Manufacturing Company after September 5? A. On or about October 1st.

Q. I show you a statement dated October 6, and I will ask you if that is the statement to which you have reference. A. Yes, sir.

Q. I show you the opening item in this statement "Balance as per our statement of September 4, \$20,905.71." Then another entry reading: "Error entering McClay invoice on statement, .20." That makes a total of \$20,905.91. Then underneath that is written the following: "Royalties, deducted from material account, \$5,775." Were you familiar with the fact that that statement was gotten up at that time? A. Yes.

Q. And was that because the statement of September 4 incorrectly included the royalties?

Mr. ERSKINE.—That is improper examination, your Honor, is leading and suggestive. I cross-examined this witness [175] under the code provision.

Mr. BARRY.—This was three weeks before the controversy arose, your Honor.

The COURT.—Objection overruled.

A. Yes.

Mr. BARRY.—Q. As a matter of fact, no controversy arose until October 24, did it?

A. No.

Q. Was there any objection made by Lombard or anyone else to the statement dated October 6, 1922?

A. No, sir.

(Testimony of Charles Hine.)

Q. I show you another statement dated October 26, 1922, and before Lombard was removed as president of the corporation; was that statement rendered to Lombard, or to someone there at the office?

A. I am quite sure it was.

Q. You referred, Mr. Hine, to notes that were received. You referred to a conversation had at the time those notes were received by Mr. Rees. Do you know what the total amount of those notes was as compared with the indebtedness of the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company?

Mr. ERSKINE.—The books ought to show that. The COURT.—Let him answer.

A. I know it was quite a sum over what was owed on material.

Mr. BARRY.—Q. How much was it over?

A. \$3,000 or \$4,000.

Q. Do you know what Lombard was trying to settle those notes for in the market at that time?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant and incompetent, and not within the issues in this case.

Mr. BARRY.—I want to show that those notes at that time would not have realized—and that Lombard was working to sell them for an amount which would just about pay the Blowpipe Company's account, and that Rees and Hine would not accept [176] them in that manner.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Did you have any conversa

(Testimony of Charles Hine.)

tion with Lombard as to what he would allow you on those notes if you would take them as payment?

A. Yes.

Q. What was said by Lombard to you, and by you to him, as to what he would allow on the notes if he would take them as payment?

Mr. ERSKINE.—When?

Mr. BARRY.—Just about that time.

A. Mr. Rees asked him what was the maximum discount he would take on those notes, and he said 12½ per cent.

Q. What did Mr. Rees say?

A. He asked him if he was willing to sell them on the market at that, and he said, "Yes."

Q. Do you know whether any actual attempt was made to sell them on the market at that discount of 12½ per cent?

Mr. ERSKINE.—I object to the question as immaterial, irrelevant, and incompetent.

The COURT.—Answer the question.

A. Lombard did, yes.

Mr. BARRY.—Q. What was said by Mr. Rees and Mr. Hine to Lombard at the time it was said that the amount of those notes was greater than the indebtedness of the Progressive Evaporator Company to the Rees Company?

A. Mr. Rees told him that we felt that we were taking a lot of risk in ever collecting the face value of the notes—many of them—and therefore we thought that we should have a greater sum than

(Testimony of Charles Hine.)

the face value of the notes and what was actually due us.

Q. Was anything said about whether the notes were being taken by you as payment, or as security?

A. Yes, that was discussed.

Q. What was said?

A. That we were going to take these notes and [177] hold them as security for our account.

Q. What account? Was any account mentioned?

A. Yes, the Rees Blowpipe Manufacturing Company's account.

Q. On what date were the notes received, if you recall?

A. The latter part of September; I cannot remember the date.

Q. Those notes were not received before the statement of September 4 was rendered, were they?

A. I do not think so.

Q. Is it not a fact that those notes were received and a receipt given by Mr. Rees to Mr. Powell on September 8? A. About that time.

Q. At any rate, the notes were received before the statement of October 6th was rendered: Is that not correct?

The COURT.—What is there about this that is material? Proceed if you have anything material.

Mr. BARRY.—Very well, your Honor.

Q. Some reference has been made about a conversation in which you said that you may be willing to take these notes in payment of royalties at some time or other. Do you remember that? A. Yes.

(Testimony of Charles Hine.)

Mr. ERSKINE.—That is objected to as assuming a fact not in evidence. The witness stated he was willing.

Mr. BARRY.—Q. Did you make that statement to Mr. Lombard, that you would be willing, or was it Mr. Rees?

A. I think I made the statement.

Q. Did Mr. Lombard say he was willing to let you do that? A. No.

Q. That was an offer made by you that was not accepted: Is that correct? A. Yes.

Q. And were any of those notes from that time forward ever applied to the payment of the royalty account? A. No, sir.

Mr. ERSKINE.—Just a moment. We object to that, your Honor, [178] as immaterial, irrelevant and incompetent.

The COURT.—Why have you brought those notes into the case? To show that this gentleman and his associates were delinquent. Objection overruled.

Mr. BARRY.—Q. I show you an account of the Progressive Evaporator Company, upon the books of the Rees Blowpipe Manufacturing Company: Were you familiar with that account at all time—I mean generally familiar with it? A. Yes.

Q. Were you familiar with the manner in which payments, as they were received, were applied?

A. Yes.

Q. Were any of those notes ever credited as payment until they were actually paid. A. No, sir.

(Testimony of Charles Hine.)

Q. Were they credited as payment when they were paid? A. Yes, sir.

Q. To what account were they credited when they were paid?

A. To the Rees Blowpipe Manufacturing Company.

Q. Two statements of October 6th and 26th, and December 30th in evidence here show how those notes that were paid prior to those dates were applied. Is that correct? A. Yes, sir.

Q. I show you this statement, showing on January 1, 1925, a balance of \$1,360.65, due from the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company. Is that correct?

A. Yes.

Q. Has any money been received since that date?

A. No.

Q. So that amount, with interest upon it, is the amount owing at this time? A. Yes, sir.

Q. After you have applied every note that has become due since the year 1922 up to this date—is that correct? A. Yes, sir.

Q. And without applying any of those notes or any of those payments toward the royalty account. Is that correct? That is correct. [179]

The COURT.—Now you have gone into that matter sufficiently. We will suspend until two o'clock. I want to notify you both that you are to confine yourselves to what is material, and only what is material.

(A recess was here taken until two o'clock P. M.)

(Testimony of Charles Hine.)

AFTERNOON SESSION.

CHARLES HINE, cross-examination (resumed).

Mr. BARRY. — Q. Mr. Hine, you were asked whether you and Mr. Rees controlled the Rees Blowpipe Manufacturing Company. What were your interests in the Rees Blowpipe Manufacturing Company?

A There are 2,500 shares of stock, and I own 833 of them.

Q. You own about one-third, and Rees owns the remaining two-thirds. Is that correct? A. Yes.

Q. These inventions which are referred to in the record here, how are those owned by you and Rees?

A. Half and half.

Q. How were the royalties payable—was it share and share alike? A. Share and share alike.

Q. You have the stock-books and other books produced here of the Rees Blowpipe Manufacturing Company at the request of the other side, have you not, showing the stock issued in that manner?

A. Yes, sir.

Q. You testified in your direct examination that you were barred by Lombard. What explanation have you to make concerning your failure to act after you became secretary of this corporation?

A. Those people who were creditors of the company demanded money of the company, and we were unable to pay them because Mr. Lombard refused to let us act as the officials of the company.

(Testimony of Charles Hine.)

Q. And there were proceedings pending in the District Court of Appeal to get the records, which terminated on February 5, as already indicated?

A. Yes, sir.

Q. Were there creditors of this company besides the Rees Blowpipe Manufacturing Company, and Rees and Hine? A. Many of them. [181]

Q. Were there any creditors of this company which brought suit against the company at that time?

A. Yes; the Diamond Match Company, and Normansen, a contractor of San Jose.

Q. Was anything done by you before those suits were brought, for the purpose of trying to pay those obligations?

A. Yes, we had that up with Mr. Erskine and Mr. Lombard, to get their consent to pay those, but we could not do it.

Q. You could not get their consent? A. No.

Q. And suits were brought? A. Yes, sir.

Q. And some time afterwards moneys were withdrawn from the bank under the order of Judge Murasky to pay those obligations? A. Yes, sir.

Q. Mr. Lombard referred to the fact that no statements were given to them as to the cost of the plant; were you ever asked by Mr. Lombard, or anybody else connected with the Progressive Evaporator Company for the cost of manufacture of the plants? A. We were not.

Q. There was a maximum price referred to in the manufacturing agreement, was there not?

(Testimony of Charles Hine.)

A. There was, yes.

Q. Did the cost of manufacture in each instance come up to the price referred to in the agreement?

A. It came up to that, and exceed it.

Q. Have you the sheets showing the cost of manufacture of each of those plants to the Rees Blowpipe Manufacturing Company? A. Yes.

Q. And you are acquainted with the maximum referred to in the agreement, are you not?

A. I am, yes.

Q. And did it equal or exceed that?

A. It exceed that.

Q. Reference has been made here to one of these patents having been in the name of the Rees Blowpipe Manufacturing Company. Were you the owner of a one-half interest in that patent? [182]

A. Yes, sir.

Q. Did you know that the patent was in the name of the Rees Blowpipe Manufacturing Company at any time?

A. I did at the time this license agreement was drawn.

Q. At the time that the license agreement was drawn? A. Yes, sir.

Q. Do you know whether Lombard knew at that time whether that particular patent was in the name of the Rees Blowpipe Company? A. Yes, sir.

Q. How do you know that?

A. Because he examined the files in the patent attorney's office at that time, at the time that the agreement was made.

(Testimony of Charles Hine.)

Q. Were all other patents in the name of Rees and Hine? Q. Yes, sir.

Q. And has that one patent been assigned back by the Rees Blowpipe Manufacturing Company?

A. Yes, sir.

Q. Did it have any beneficial interest in that patent at any time, or in the invention represented by the patent? A. No, sir.

Q. You referred in your examination this morning to certain notes which were taken by the Rees Blowpipe Manufacturing Company as payment; can you state what those notes were?

A. I can state some of them, not all of them.

Q. State the ones you recall.

A. The Stiles note, and the Wilbur note, are two that I remember.

Q. During the months of November, December, and January, are sales ordinarily made of evaporator equipment? A. No, sir.

Q. Are those selling months? A. No, sir.

Q. During the months of November, December and January, even though there were no controversy in this company, would any sales ordinarily be made? A. Very, very few, if any.

Q. What is the period during which the sales force operates [183] in this business?

A. February, March, April, May, and June.

Q. You were questioned this morning about the cancellation of the license agreement when this controversy arose in the Progressive Evaporator Company. Up to November 1st, the day upon

(Testimony of Charles Hine.)

which Lombard was ousted as president of the company, was there anything ever said by you to Lombard, or anybody else, about cancelling the license agreement? A. I do not think so.

Q. Did Lombard, or anybody else, say anything to you about wishing the corporation to cancel the license agreement? A. No, sir.

Q. When was it that any arrangement or agreement was entered into with Neal with reference to a new license agreement?

A. A long time after that trouble.

Q. And when was it with reference to the time that you gave notice of the cancellation of the license agreement held by the Progressive Evaporator Company? A. I don't remember that date.

Q. You don't remember the date?

A. No, not just now.

Q. You have not got the agreement between Rees, and Hine, and Neal, and Ward, have you?

A. I don't seem to find it there; I thought we had it.

Mr. ERSKINE.—I ask for the production of that instrument. Perhaps it will be stipulated that the terms of that agreement were substantially the same as the agreement that was given to the Progressive Evaporator Company.

Mr. BARRY.—Yes, that is correct.

Mr. ERSKINE.—Will it be furthermore stipulated, for the purpose of the record, that at or about the same time this agreement was entered into with the Progressive Dehydrator Company? [184]

(Testimony of Charles Hine.)

Mr. BARRY.—Yes.

Mr. ERSKINE.—And it is practically the same agreement as the other?

Mr. BARRY.—Yes.

Mr. ERSKINE.—This agreement with the Rees Blowpipe Company bears date the 14th of February, 1923. That was approximately the date of the other agreement which you are unable to find, is it?

Mr. BARRY.—I would say approximately. I cannot give you the exact date of it.

The COURT.—And is that agreement offered?

Mr. BARRY.—The agreement between the Progressive Dehydrator Company and the Rees Blowpipe Manufacturing Company, for the manufacture of the plants. There was another agreement on or about the same date between Rees and Mr. Hine, as the patentees, and the Progressive Dehydrator Company covering a license agreement in practically the same terms as the one that the corporation held.

Mr. ERSKINE.—And, furthermore, the Progressive Dehydrator Company was a copartnership consisting of Mr. Neal, the former president of the Progressive Evaporator Company, and Mr. Ward. Will you give me that stipulation?

Mr. BARRY.—I will give you that stipulation. I think that is a fact.

Q. Do you recall whether or not any injunction was issued and served upon you in Judge Murasky's court, requiring you to maintain the *status*

(Testimony of Charles Hine.)

quo of this company as of October 26th or 27th, 1922?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent, and not proper cross-examination.

Mr. BARRY.—It goes to the matter of their ability to [185] proceed afterwards, your Honor.

The COURT.—I will overrule the objection.

A. Yes, I think it was.

Mr. BARRY.—You will admit, Mr. Erskine, that at your request, about December 4 or 5, an injunction was issued by Judge Murasky requiring these gentleman to maintain the *status quo* as of October 25?

Mr. ERSKINE.—I have a certified copy of that injunction, and of all the orders made by Judge Murasky in connection with that restraining order, and also a certified copy of the Register of Actions.

Mr. BARRY.—I am going to have all the papers here. I have a party who is going to bring all the papers here.

Mr. ERSKINE.—I will ask to have that put in evidence.

The COURT.—Proceed.

Mr. BARRY.—Q. Do you recall any matter coming up at any time about the Progressive Evaporator Company branching out into some other line of business than the Progressive Evaporator business?

A. Yes.

Mr. ERSKINE.—That is objected to as imma-

(Testimony of Charles Hine.)

terial, irrelevant, and incompetent, and not within the issues. The point about that is this, your Honor. One of the elements of dispute was the fact that the Progressive Evaporator Company was going into the orchard-heating business. That has nothing to do with this case.

Mr. BARRY.—I just want to show your Honor the atmosphere.

The COURT.—I don't want anything shown that is not material. Objection sustained.

Mr. BARRY.—Q. Do you know how many evaporators were sold in 1923?

A. About 32, or somewhere along there. [186]

Q. Were any moneys ever paid by the Progressive Evaporator Company to Rees and Hine, on account of royalties? A. No, sir.

Mr. ERSKINE.—I want to object to that, your Honor, on the ground that it is the conclusion of the witness, and I ask that the answer be stricken out. He answered it before I could get an opportunity to object.

The COURT.—The witness has a right to give his version of it. You have given yours. He is not obliged to accept your version of it. He is entitled to give his. Objection overruled.

Mr. BARRY.—Q. Were any moneys ever paid by the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company, to your knowledge, for any other purpose than payments on account of the so-called manufacturing account?

Mr. ERSKINE.—The same objection.

(Testimony of Charles Hine.)

The COURT.—Objection overruled.

Mr. ERSKINE.—Exception.

A. No, sir.

Mr. BARRY.—Q. As late as December 30, 1922—this is a statement not heretofore referred to—Lombard was claiming to be the president of this company, was he not?

A. Yes, sir.

Q. And the books, and the papers, and the records were still in the possession of Lombard; is not that correct? A. I think so.

Q. Do you recall the time when the safe of this company was bodily moved by Mr. Lombard from the office of the company to a safe-deposit vault, so that you could not get access to it?

Mr. ERSKINE.—I object to that as immaterial, irrelevant, and incompetent, and some more scenery about the wrangling that [187] was going on.

Mr. BARRY.—This is not scenery, your Honor.

The COURT.—You are complaining that he did not do his duty; he is now showing why. Objection overruled.

Mr. BARRY.—Q. I say do you recall the safe in which the books and records were supposed to be kept being moved out of the office of the company?

A. I do.

Q. Do you know where that safe was moved?

A. The safe-deposit vaults of the First National Bank.

Q. And were you permitted to have access to that

(Testimony of Charles Hine.)

safe after you were elected secretary of the company? A. No, sir.

Q. Were any books, papers, or records delivered over to you at all after the Court of Appeal, in February, 1923, decided that you were entitled to those records? A. No, sir.

Q. When this license agreement was cancelled, or when the notice of cancellation was given on January 12, 1923, why didn't you function, or attempt to function as an officer of the Progressive Evaporator Company?

Mr. ERSKINE.—That is objected to, if your Honor please, as calling for the conclusion of the witness, and on the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—In other words, you would insist that he could not tell why he did not act. I think not. Objection overruled.

Mr. ERSKINE.—Exception.

A. We did try to. We tried in every way to get permission there from those who were opposing us to pay bills and get the company's matters straightened out, but we could not get anywhere with them.

Mr. BARRY.—Q. And was that attitude manifested even before you cancelled the license agreement?

A. Yes.

Mr. ERSKINE.—Your Honor, I did not get a chance to object. [188] The witness answered, "Yes" so quickly after Mr. Barry put the question

(Testimony of Charles Hine.)

that I did not have an opportunity to object. I move to strike out the answer. That is manifestly calling for the conclusion of the witness, and I object to it on that ground.

The COURT.—You can cross-examine him with reference to it. Objection overruled.

Mr. BARRY.—Q. I show you a statement of checks, purporting to be a statement of checks proposed to be issued, dated April 11, 1923, some three months after this notice of cancellation was given; what does that list represent?

A. It is a list that I made out and you arranged with Mr. Erskine for me to meet himself and Mr. Lombard and see if Mr. Lombard would consent to the payment of these moneys.

Mr. ERSKINE.—Q. You don't mean this Mr. Erskine, do you?

Mr. BARRY.—He means Mr. Erskine's brother, Mr. Morse Erskine.

Q. Did you meet with them? A. I did.

Q. Did you present the list? A. I did.

Q. And what did you say as to the reason why you wanted those checks drawn?

A. I said at the time that we felt that those people that were not interested in the controversy should have their money and be eliminated out of the matter, and Mr. Lombard said he would not consent to the payment of any of those moneys. Mr. Erskine's brother said to him, "Why not pay these bills, they have to be paid." Lombard said, "If I

(Testimony of Charles Hine.)

get control of the company, then I will issue notes and will not have to give up the money.”

Q. And no checks were drawn? A. No, sir.

Q. On this list is \$1,000 to E. Normanson.

A. Yes.

Q. Did he bring suit on that claim?

A. Yes. [189]

Q. On this list of \$1,000 to the Diamond Match Company; did it bring suit on that claim?

A. Yes.

The COURT.—I will say right now that if this case is not finished to-day it will have to go over until Saturday. I have a jury for to-morrow, and I am not going to send them home. The length of time taken in this case is excessive.

Mr. BARRY.—Q. I notice on this statement that there is \$2,654; that was money to be left in bank at that time, was it? A. Yes.

Q. Were there any other obligations besides the \$3,200.95? A. Yes.

Q. Why didn't you pay the rest of them?

A. That was the money in controversy over the stock.

Mr. BARRY.—I offer this list in evidence and ask that it be marked Defendant's Exhibit "E."

(The document was here marked Defendant's Exhibit "E.")

Q. Showing you this statement of December 30, 1922, you stated that Lombard was in the office of the company at that time. Is that correct?

A. Yes.

(Testimony of Charles Hine.)

Q. And claiming to be its president? A. Yes.

Q. Was this statement sent to the company at that time, December 30? A. I think so.

Q. Was any objection made to that statement, or any of the items in it? A. No, sir.

Q. It purports to be a statement of royalties due up to that date, aggregating \$7,260? A. Yes, sir.

Q. Were any objections made by Lombard or Powell, or anyone else, to any of the statements rendered by the Rees Blowpipe Manufacturing Company to the Progressive Evaporator Company?

A. Not to my knowledge.

Q. Was any objection ever made by Lombard, or anybody else [190] purporting to represent the Progressive Evaporator Company, as to the amount charged by the Rees Blowpipe Company for the plants? A. No, sir.

The COURT.—Just a moment. You have gone over that repeatedly. If the Court must take the examination out of your hands it will do it, if you do not keep within reasonable bounds. Anything further?

Mr. BARRY.—That is all, your Honor.

Redirect Examination.

Mr. ERSKINE.—Q. Mr. Hine, I understand you to state that you could not do any business on account of the quarrel that was ensuing between Mr. Lombard and yourselves. Is that the fact?

A. Yes, sir.

Q. In other words, that is the reason why you

(Testimony of Charles Hine.)

never tried to pay yourselves the amount of this \$7,260 which you claimed as royalties. Is that the fact?

A. I would say that that is the reason why we did not pay anything.

Q. As a matter of fact, you came to Mr. Lombard early in January, did you not, and asked for permission to pay Mr. St. Marie \$500 that was due him? A. Yes.

Q. And the permission was given, was it not?

A. Yes, for that one check.

Mr. ERSKINE.—Have you that receipt, Mr. Barry?

The COURT.—You don't need it; he has admitted it.

Mr. ERSKINE.—Q. That was prior to the time that you cancelled the license. As a matter of fact, you also went down and got the books, did you not, in spite of the terms of the order of Judge Murasky?

A. Under the instructions of Mr. Barry, I did.

Q. And at that time you made the statement, did you not—let me call it to your attention. [191]

Mr. BARRY.—That was after the District Court of Appeal decided the *mandamus* proceeding.

Mr. ERSKINE.—Yes, it was shortly after this time. As long as you have gone into the subject, I have the right to show the entire situation.

The COURT.—Never mind arguing, Counsel. Ask the question and we will see what it is. We are not going into anything that is not material.

(Testimony of Charles Hine.)

Mr. ERSKINE.—Q. When you went down there on February 8, 1923, which is a short time after you revoked the license, did this conversation occur between you, and Mr. Lombard, and Mr. Powell. Did Mr. Lombard say, “Good morning, Maurauders”—

The COURT.—Now, just a minute. Let me see that. Are we to have all the details, “good morning,” and all that?

Mr. ERSKINE.—The witness said he did not care about the order of the Court.

The COURT.—Q. Ask him that.

Mr. ERSKINE.—Did you say, “We don’t care for your contempt proceedings”? Did you say that when Mr. Lombard called your attention to the order of the Superior Court?

A. Yes, I did, because Mr. Barry told me that the other order went over that.

Q. In other words, on the 8th of February you were not regarding this order of the Court that your counsel has referred to? A. Oh, yes, we did.

Q. Did you not tell Mr. Lombard that you were not regarding that order?

The COURT.—Pass on. We don’t care for that. Judge Murasky will take care of that if there is anything of that sort. We don’t care to hear it here.

Mr. ERSKINE.—Q. You asked Powell and Lombard to approve [192] of the St. Marie claim, did you not? A. Yes.

Q. You also say that you made some request of Mr. Lombard with respect to some other bills to be paid? A. Yes.

(Testimony of Charles Hine.)

Q. Those were the bills of Normanson, and the like? A. Yes.

Q. That was in April, 1923, wasn't it, that you asked him to pay those bills? A. I think so.

Q. And that was long after you cancelled the license? A. Yes, sir.

Q. And when you asked him to pay the bills he agreed to some and questioned others, didn't he?

A. He did not agree to any, as I remember it. We never issued a check at that time.

Q. Is not this the statement that you rendered to him at that time?

A. I think so; that is, I think that is a duplicate of what Mr. Barry had there.

Q. And in that conversation that you had with my brother in April, did he not mark these O. K. and those questionable just like that, and take it up with you there?

A. Possibly. I don't remember which ones were marked, but I remember the discussion your brother had with him that the bills had to be paid.

Q. Right after that what did you do? After this was submitted and Lombard questioned some of those items, what did you do?

Your Honor, I offer in evidence here the same list that was presented to us, and ask that it be marked as an exhibit.

The COURT.—Admitted.

(The document was here marked Plaintiff's Exhibit No. 5.)

Mr. ERSKINE.—Q. What did you do then?

(Testimony of Charles Hine.)

A. I don't remember.

Q. You secured, did you not, by an *ex parte* order from Judge Murasky, permission to pay those bills?

A. I think we did, yes. [193]

Mr. BARRY.—And it was not consented to, was it, Mr. Erskine?

Mr. ERSKINE.—It was an *ex parte* order modifying an *ex parte* order. I think you will stipulate that this is a copy of the order. I have it certified. I offer here a certified copy of the order made from the Superior Court for the payment of all these moneys which were in the list, made on the 16th day of April, 1923. I ask that it be marked our exhibit next in order.

The COURT.—Admitted.

(The document was here marked Plaintiff's Exhibit No. 6.)

Mr. ERSKINE.—Q. Now, prior to that time, Mr. Hine, you had also been anxious to pay other bills, had you not, and your attorney went and got an order of Court to pay those, an *ex parte* order?

A. I don't remember all those transactions.

Q. I call your attention to this order of February 20, 1923, referring to payments to St. Marie, Brand, Daniels, W. W. Hine, yourself—

A. No, that was not myself, that was my brother.

Q. All right. Those were paid in February, were they not? A. I would judge so.

Mr. ERSKINE.—Mr. Barry, you will admit that this *ex parte* order was secured.

(Testimony of Charles Hine.)

Mr. BARRY.—If it is a certified order, Mr. Erskine, I have to admit it.

Mr. ERSKINE.—I offer these certified copies in evidence, and ask that they be considered as if read.

Q. Did you ever ask your attorney or anybody else to secure an *ex parte* order modifying the order of the Superior Court so that you could pay the royalties?

A. No. We were only interested in those that were disinterested in the fight. [194]

Q. You did not ask Lombard, or anybody else, to agree to the payment of the royalties, did you?

A. We talked about it a great many times in Mr. Lombard's office, and asked him what he was going to do about the payment of royalties.

Q. When?

A. September, and October, and all those months.

Q. I mean after this row started. A. No, sir.

Q. In other words, did you ever at any time after you claim that you were prevented by the order of court, and by the controversy that existed, did you ever ask Lombard or Powell to agree to the payment of those royalties out of moneys on hand?

A. There was not enough money on hand to pay them at that time.

Mr. ERSKINE.—I move to strike out the answer as not responsive.

The COURT.—Let it be stricken. Answer the question.

A. No.

(Testimony of Charles Hine.)

Mr. ERSKINE.—Q. And did you ever call it to their attention that you were not going to pay those royalties? A. I think we did.

Q. When? A. When we gave them that list.

Q. When you gave them the list of April 10, 1923, but that was two months after you cancelled the contract, was it not?

A. I cannot vouch for the time.

Q. You cancelled the contract on the 13th of January, 1923, or on the 12th of January. You were asking for the payment of these claims some time in April. I will ask you if you ever asked your attorney to get an *ex parte* order to allow you to pay these royalties? A. No.

Q. Did you ever ask Mr. Barry to get such an order?

Mr. BARRY.—Now, just a moment. I object to the question on the ground that the proper foundation is not laid showing that there was any money on hand to pay those claims. [195]

The COURT.—He may answer the question.

A. No, I did not.

Mr. ERSKINE.—Q. Did you ever ask Mr. Lombard, or Mr. Powell, to consent to that payment of royalties, as you asked them to consent to the St. Marie payment? A. No.

Q. You had an audit made of those books, did you not, from time to time, the books of the Progressive Evaporator Company?

A. There was an audit made right after the

(Testimony of Charles Hine.)

trouble, but after that time there was never any regular audit made.

Q. I will call your attention to an audit that your counsel was kind enough to give to me. This is his report of examination made by Bullock & Kellogg, on December 31, 1923, fully a year after this trouble. Do you remember having them make that audit?

A. Yes.

Q. Now, calling your attention to this: There were notes on hand a whole year later, on December 31, 1923, amounting to over \$14,000, were there not?

A. Yes, sir.

Q. And those notes had not been assigned to the Rees Blowpipe Company, had they?

A. I believe not.

Q. After the payment of all of the claims which you have referred to, you still had on hand \$14,885 worth of notes, did you not? A. No, sir.

Q. You had then on hand, according to this examination and report of the auditors, did you not?

A. The reason I made that answer is that there were certain of those big sums that were not paid, and even after this was made some of those notes were paid.

Q. But at the time that you cancelled your license you had on hand this \$14,885 worth of notes, did you not? A. I think so.

Q. Now, in addition to that, you had on hand, in the bank, in dispute, the \$2,600 for stock, which you had both put in. [196] A. Yes.

(Testimony of Charles Hine.)

Q. Did you attempt in any way to apply the \$2,600 to the payment of these royalties? A. No, sir.

Q. Did you attempt to raise any money on the \$14,885 worth of notes to pay these royalties?

A. No, sir.

Q. And as far as any attempt to pay the royalties is concerned, you made none, whatever?

A. No, sir.

Q. The discussions with reference to cancelling this license occurred prior to December 12, the day that Judge Murasky issued the injunction, the *ex parte* restraining order which we have referred to, did you not? A. I could not say.

Q. As a matter of fact, you testified in Judge Murasky's court, did you not, as follows:

"As I tried to explain to you, you cannot get me to say any certain time, because there had been discussions about the cancellation of this from the very time the fight started.

"Q. From the very time the fight started?

"A. Yes.

"Q. Discussions with whom?

"A. Amongst ourselves."

The order of Judge Murasky was made on December 12. When did the row occur, when did the fight start, do you recollect? A. It was in October.

Q. So that between October and December 12 you were discussing about the cancellation of the agreement, were you not?

A. I am sure there were discussions about it.

(Testimony of Charles Hine.)

Q. There were discussions about it long before Judge Murasky made his *ex parte* order?

A. I am sure there were discussions about it.

Q. I think I failed to ask you, Mr. Hine, what was the selling price to purchasers from the Progressive Evaporator Company of the various devices—I think it is the four-truck machine—what was the selling price?

A. I cannot tell you those figures [197] right out of my my head. We can get them for you.

Q. Could you furnish them before the end of the day, so that we can put them in evidence?

A. Yes.

Q. This account was referred to by your counsel on his examination of you; by “this account” I mean the account that the Rees Blowpipe Manufacturing Company kept with the Progressive Evaporator Company. This account was never called to the attention and never presented to Lombard, or Powell, or anybody connected with the Progressive Evaporator Company prior to the cancellation of the license, was it, that is, you never showed it to them, did you?

A. You mean the ledger sheets?

Q. Your ledger sheets.

A. No, I am sure we did not.

Q. It was your own account, kept by the Rees Blowpipe Manufacturing Company? A. Yes.

Mr. ERSKINE.—This has not been offered in evidence. I ask that it go in evidence. The testi-

(Testimony of Charles Hine.)

mony of the witness and the questions of counsel referred to it.

The COURT.—Admitted.

(The document was here marked Plaintiff's Exhibit No. 7.)

Mr. ERSKINE.—Q. You made the statement, and I would like to correct you if I can about this point; you made the statement in answer to your own counsel's question that Mr. Lombard knew about the assignment of the patent to the Rees Blowpipe Manufacturing Company before the license agreement was made. Is it not a fact that the license agreement was made in February of 1922, and that the assignment did not take place until April of 1922?

A. I beg your pardon, I did not say that; I said that Mr. Lombard knew that the patent was in the name of the Rees Blowpipe Manufacturing Company, but I did not say he knew it was assigned, because it was not assigned, as we afterwards found out. [198]

Q. He did not know at the time that a license agreement was entered into that it was in the name of the Rees Blowpipe Manufacturing Company?

A. Yes, he did. It was assigned afterwards to Rees and Hine. At the time Mr. Rees took out the patent, it was immediately assigned to the Rees Blowpipe Company.

Q. The license agreement is dated, February, 1922. A. I know that.

(Testimony of Charles Hine.)

Q. The patent was issued and assigned to the Rees Blowpipe Company on the 18th of April, 1922.

Mr. BARRY.—Just a moment. The document does not show that the assignment took place on that date.

The COURT.—And it has no place in this case. It does not make any difference. Proceed with the examination.

Mr. ERSKINE.—Q. Did you ever tell Lombard that that had been assigned back to you?

A. No, I don't think it was ever discussed. We were under the impression that it was assigned, but it was never discussed.

Q. You never rendered any statements for royalties except the statements that have been introduced in evidence here, on the statement heads of the Rees Blowpipe Manufacturing Company?

Mr. BARRY.—Some of those statements refer to royalties due Rees and Hine.

The COURT.—Well, they will show for themselves. The question has been asked and answered a dozen times, if not more. Proceed with the examination.

Mr. ERSKINE.—I will withdraw that question.

Q. Something was said this morning about the statements of September 4 and 5 being made in error; your counsel said that, and that you corrected it by the October 6th statement. Is [199] that the fact? A. I think it is.

Q. Did you call the attention of Mr. Lombard

(Testimony of Charles Hine.)

or Mr. Powell to the fact that the September 4th statement was erroneous?

Mr. BARRY.—That is objected to on the ground that the rendition of the new statement called that to their attention.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Was anything ever said by you to them that the September 4 statement was erroneous?

A. I don't remember that anything was ever said.

Q. Now, referring to the statement dated October 26, do you know when that was delivered to the Progressive Evaporator Company?

A. I think it was there on the day we were trying to hold a meeting; I think it was.

Q. That was October 7—the day the row occurred? A. No, October 26.

Q. I mean October 27.

A. Yes, October 27. I think we had that statement made out to see where we were standing.

Mr. BARRY.—You are referring to the statement of October 26th, are you?

Mr. ERSKINE.—Yes, October 26th.

Q. Did you leave it at that time with Mr. Powell?

A. I don't remember.

Q. Do you remember whether you left the statement of September 30th with Mr. Lombard or with Mr. Powell? A. No, I don't think we did.

Q. You were then claiming to be secretary, were you?

(Testimony of Charles Hine.)

Mr. BARRY.—He was actually the secretary at that time.

The COURT.—Anything further with this witness?

Mr. ERSKINE.—Yes, I have one other matter.

The COURT.—Be brief.

Mr. ERSKINE.—Q. You spoke about the quiet season being [200] from January to March; on the other hand, that is when the proselyting and the work on prospects is done, is it not?

Mr. BARRY.—He said from November to January.

Mr. ERSKINE.—All right.

A. No, it never has been.

Mr. ERSKINE.—I want to offer in evidence this list of notes receivable in this audit of Bullock & Kellog, which I referred to in my examination of Mr. Hine. I offer the whole thing.

Mr. BARRY.—Yes, let the whole statement go in if you wish.

Mr. ERSKINE.—Yes, I will offer it all.

(The document was here marked Plaintiff's Exhibit No. 8.)

Mr. ERSKINE.—Also in connection with the testimony of Mr. Hine I want to offer in evidence a certified copy of the Register of Actions in the case in Judge Murasky's Court, and ask that it be considered as if read.

The COURT.—Admitted.

(The document was here marked Plaintiff's Exhibit No. 9.)

(Testimony of Charles Hine.)

Mr. BARRY.—Q. Mr. Hine, counsel introduced in evidence part of the statement of the Progressive Evaporator Company with the Rees Blowpipe Manufacturing Company; you referred this morning to a balance of \$1,360.65, due at this time. These two sheets which I have in my hand show how that balance was arrived at, do they not?

A. Yes.

Mr. BARRY.—I ask that these two sheets be admitted in evidence at this time.

The COURT.—Admitted.

(The documents were here marked Defendants' Exhibit "F.")

Mr. BARRY.—Q. Mr. Hine, was anything done about the mail of this company? Who received the mail of the Progressive Evaporator Company during November, December, January and [201] February of 1922 and 1923?

A. I presume it was received at Mr. Lombard's office.

Q. None of it came to the Humboldt Bank Building, did it?

A. We could not get the postoffice to transfer it.

Q. Did they state why they could not transfer it?

A. Yes.

Q. Why?

A. Because Mr. Lombard had told them not to.

Q. Do that during that period of time, November, December, January, and February, the mail was going to the old office, was it? A. Yes, sir.

(Testimony of Charles Hine.)

I state my purpose, your Honor, in this connection?

The COURT.—We was asked why he did not try to borrow on [203] the notes. He may state why.

A. Previous to that time we had tried; any number of times those notes—

Q. Now, you are asked why you did not try. Come to it briefly.

A. Because of the failure before by Mr. Lombard and Mr. Rees, and different ones who had tried to finance them.

Mr. BARRY.—Q. Had you gone, prior to that date, and had Mr. Rees prior to that date, gone to different persons to whom he could go for the purpose of seeing if those notes could be discounted?

Mr. ERSKINE.—I object to that if it was prior to the time of the cancellation agreement, or prior to the time when he became secretary, upon the ground that it is hearsay, and immaterial, irrelevant, and incompetent, and not within the issues of the case.

Mr. BARRY.—I want to show that every available source had been canvassed.

The COURT.—Objection overruled.

A. Mr. Rees had, I had not.

Mr. BARRY.—Q. Where did you bank at that time?

A. In the Crocker Bank.

Q. Had you taken that matter up with the

(Testimony of Charles Hine.)

Crocker Bank, or had Mr. Rees, to your knowledge, taken it up with the Crocker Bank? A. Yes, sir.

Mr. ERSKINE.—I want to object to that as calling for hearsay testimony. The witness said Mr. Rees did, that he did not.

The COURT.—He may state if he knows.

A. I know it.

Mr. BARRY.—Q. Do you know that of your own knowledge?

A. Yes, sir. [204]

Q. Do you know with whom Mr. Rees had taken the matter up particularly? A. Mr. Kern.

Q. What was said by Mr. Kern, of the Crocker Bank, at that time, about the reason why they could not handle this paper?

Mr. ERSKINE.—That is objected to, your Honor, upon the same grounds.

The COURT.—Objection sustained.

Mr. BARRY.—The purpose of that is this, your Honor; it is simply to show that because Lombard's name was on the back of those notes they would not touch them.

The COURT.—I don't care about that. If you think you are going to get anywhere in this case by besmirching each other, you are mistaken. If they show that you are in fault they will have a decree against you; if they do not, they won't, regardless of Lombard.

Mr. BARRY.—Pardon me, I did not intend to go outside the record, your Honor.

Q. You were asked why you did not pay any of

(Testimony of Charles Hine.)

these moneys upon the royalty account; why didn't you pay the moneys that were in the bank upon the royalty account? A. I cannot say.

Q. After you cancelled the agreement, there was nothing to prevent you from paying part of the royalty account, was there?

Mr. ERSKINE.—I object to that, your Honor upon the ground that it is calling for the conclusion of the witness.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Up to this day, have you, as secretary of the company, ever attempted to apply any of the moneys of the Progressive Evaporator Company, or the assets of the company, toward the payment of the royalty account?

A. No, sir.

Q. And this license agreement was cancelled as you say, on [205] January 12th?

A. Yes, sir.

Q. Are there to-day creditors of this company who are still unpaid?

Mr. ERSKINE.—The same objection, your Honor.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Are there sufficient assets of this company—

The COURT.—You have gone over that. If you have anything further that is material, ask it otherwise, the witness will vacate the stand.

Mr. BARRY.—That is all.

(Testimony of Claude Rees.)

The COURT.—Vacate the stand. Call the next witness.

Mr. ERSKINE.—May I ask the witness just one question, your Honor?

The COURT.—No. You have handed him back and forth between you two or three times. Call your next witness.

Mr. ERSKINE.—I just want to ask one more question.

The COURT.—Call your next witness, if you have one, otherwise your case will be closed.

TESTIMONY OF CLAUDE REES, FOR PLAINTIFF.

CLAUDE REES, called for the plaintiff, sworn.

Mr. ERSKINE.—Q. You are one of the defendants that we have referred to in this case during the taking of the testimony here?

A. Yes, sir.

Q. There was a statement made here by Mr. Hine that you had a certain book in which he had seen references made to certain of these notes.

A. Yes.

Q. Have you got such a book?

A. The book is here.

Q. Will you produce it?

Mr. BARRY.—Here it is. [206]

Mr. ERSKINE.—Q. Is this the book?

A. Yes, sir.

Q. What are the memoranda in that book?

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Claude Rees et al. vs.
(Testimony of Claude Rees.)

A. That is the Progressive Dehydrator Company, which was Ward and me.

Q. Where is the other matter?

A. It is not in here.

Q. Was it ever in here? A. Yes, sir.

Q. Where is it now?

A. That book was around the office, and the pages are gone.

Q. The pages which referred to those entries which were made have gone? A. Yes, sir.

Q. When were they taken out?

A. I don't know.

Q. Were they taken out before the cancellation, or afterwards? A. I cannot tell you.

Q. As a matter of fact, Mr. Rees, they were taken out, were they not, after the cancellation of this contract?

A. I answered you I could not tell you.

Q. What pages were they on? The first page of this book starts with page 9. A. I don't know.

Q. What pages were they on?

A. I don't know.

Q. Did they take the entire nine pages?

A. I don't know. They were on two pages of that book, and there are nine pages out of the book.

Q. And that book was lying around the office?

A. Yes, sir.

Q. And these pages were taken out, and you have not the slightest knowledge about how they were taken out? A. No, sir.

(Testimony of Claude Rees.)

Mr. ERSKINE.—I ask that the book be offered in evidence as it stands.

Mr. BARRY.—No objection. Just a minute. You are putting it in for the purpose of showing what—the absence of the pages?

Mr. ERSKINE.—I am going to connect it up and show what those entries were. [207]

The COURT.—The book has no business in the case, as long as it has no evidence. It is excluded.

Mr. BARRY.—I object to it—

The COURT.—Just a minute. The Court will not hear any objection. It is excluded of the Court's own motion. He has admitted that the entries were there and are torn out; that ends it.

Mr. ERSKINE.—Q. Now, I will ask you about those entries. On one side of the book were entered royalties to be paid to Rees. Is not that the fact?

A. No, I could not tell you that.

Q. Can't you tell me anything about the entries in the book?

A. I can only tell you this: I believe there were four entries in that book. It was two notes segregated for Hine and two notes segregated for Rees.

Q. Two notes? A. Yes.

Q. Two notes segregated to Hine and two notes to Rees; were they equal amounts?

A. I cannot tell you that. The only thing I can tell you is that I remember one of those notes was the Kooser note, and another a Stevens note, and the

(Testimony of Claude Rees.)

two notes amounted to something in the neighborhood of \$4,000.

Q. Those notes were notes that had been given to the Rees Blowpipe Company? A. Yes.

Q. And by the Rees Blowpipe Company were given over to you? A. Yes.

Q. Did you collect the money on those notes?

A. Yes. When you say did I collect the money—the money was collected into the Rees Blowpipe Manufacturing Company's account.

Q. But this book that you refer to is not a book of the Rees Blowpipe Manufacturing Company?

A. It is a memorandum book, as you see it.

Q. Was it one of the books of the Rees Blowpipe Manufacturing [208] Company?

A. No.

Q. It was a book which was to indicate the division of the royalties between you and Hine, was it not? A. As far as I can tell you, yes.

Q. And that account in which you entered the receipt of these notes was a royalty account, was it not? A. No, sir.

Mr. BARRY.—He told you there was only an entry of four notes.

A. (Continuing.) Only an entry of four notes.

Mr. ERSKINE.—Q. Divided between you and Hine?

A. Yes, sir.

Q. For what?

A. If we received payment on those notes and

(Testimony of Claude Rees.)

those notes were paid in excess of the merchandise account, we were going to take the money.

Q. And that is your recollection of what those notes were? A. Yes.

Mr. ERSKINE.—That is all for the present.

The COURT.—Just a moment, just a moment. You have the witness on the stand, now, and you must finish with him. If you want to use him, use him now. I don't propose to have the witness trotting back and forth on the stand two or three times. Do you want to examine him further?

Mr. ERSKINE.—No, I do not.

The COURT.—Any cross-examination?

Mr. BARRY.—Yes, your Honor.

The COURT.—Cross-examine.

Cross-examination.

Mr. BARRY.—Q. Do you recall any conversation that took place at one time about Rees and Hine being willing to take certain long-term notes in payment of the royalty account?

A. Yes. [209]

Mr. ERSKINE.—Just a moment. I object to the question on the ground that it is not proper cross-examination.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Were these four notes accepted by Rees and Hine in payment of the royalties?

Mr. ERSKINE.—The same objection.

Mr. BARRY.—I submit that that is entirely material, your Honor.

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Claude Rees & Co. vs. Es.
(Testimony of Claude Rees.)

Mr. ERSKINE.—I only asked about the contents of the book.

The COURT.—Objection sustained.

Mr. BARRY.—Q. What were these entries made in the book to which you referred, what were they made for?

A. Those notes were amounts which were in excess of the amount that was owed to Rees Blowpipe Manufacturing Company on the bunch of notes which I held as security.

Mr. ERSKINE.—I move to strike out the words “which I held as security,” as the conclusion of the witness.

The COURT.—Motion denied.

Mr. ERSKINE.—Exception.

Mr. BARRY.—Q. Were those notes afterwards cashed, that is, those four notes were they afterwards paid?

A. Yes, sir.

Q. How were those moneys applied when those notes were paid?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent, and not part of the direct examination of the witness; I did not ask him anything about that fact.

Mr. BARRY.—I am asking him about the purpose of the entries.

Mr. ERSKINE.—Counsel is proposing to prove his case by this witness. I asked him solely about the entries in the book.

The COURT.—You brought the matter out, ex-

(Testimony of Claude Rees.)

pecting something to be inferred. He has a right to show what they were [210] really for. Objection overruled.

Mr. ERSKINE.—Exception.

A. They were applied to the account of the Progressive Evaporator Company with the Rees Blow-pipe Manufacturing Company.

Mr. BARRY.—Q. Do you recall a conversation prior to the date that those entries were made, which resulted in Lombard handing you a large number of notes, including these notes?

Mr. ERSKINE.—He is putting the same question that your Honor sustained an objection to a few minutes ago.

The COURT.—Objection sustained.

Mr. BARRY.—Q. When did you get possession of those notes which were entered in this book?

Mr. ERSKINE.—The same objection.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Mr. Rees, do you recall—and this is with due deference to your Honor—do you recall that prior to that time certain notes in addition to these four notes were received by you from Mr. Lombard?

Mr. ERSKINE.—The same objection.

The COURT.—Objection sustained.

Mr. BARRY.—Q. What did those notes aggregate, Mr. Rees?

Mr. ERSKINE.—The same objection.

The COURT.—He may answer that.

A. In the neighborhood of \$4,000.

(Testimony of Claude Rees.)

Mr. BARRY.—Q. What amount of money was owing to Rees and Hine on royalties at the time that those entries were made in that book?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained. Anything further?

Mr. BARRY.—Yes, your Honor. [211]

Q. You referred to those notes; do you recall the names of the makers of the notes?

A. I only recall right now three of them.

Q. By whom were those notes collected?

A. By the Rees Blowpipe Manufacturing Company.

Q. I show you the account in evidence here of the Progressive Evaporator Company with the Rees Blowpipe Manufacturing Company and I will ask you whether or not this account shows that those payment, when made, were applied toward the Progressive Evaporator Company's account with the Rees Blowpipe Manufacturing Company.

Mr. ERSKINE.—The same objection to that question, your Honor. I simply asked as to the entries in this book.

The COURT.—Objection sustained. Anything further?

Mr. BARRY.—Yes, your Honor.

Q. Do you know anything about what became of the pages in that book? A. No, sir.

Q. You would like to have the pages now, would you not? A. Yes, sir.

(Testimony of Claude Rees.)

Q. You have not done anything to do away with the book itself, have you, Mr. Rees?

A. No, sir.

Q. It was used afterwards to contain the royalty account, as I understand it, of Ward and Neal?

A. Yes, sir.

Mr. BARRY.—That is all.

TESTIMONY OF MALCOLM A. NEAL, FOR
PLAINTIFF.

MALCOLM A. NEAL, called for the plaintiff, sworn.

Mr. ERSKINE.—Q. Mr. Neal, what is your occupation at the present time?

A. Advertising.

Q. Are you connected in any way now with the Rees Blowpipe Company?

A. None whatsoever. [212]

Q. What was your position in 1922?

A. Vice-president of the Progressive Evaporator Company, Inc.

Q. And on November 1, 1922, according to the minutes, here, you were made the president of that company. Is that the fact? A. Yes, sir.

Q. And you were the president of that company during 1923, were you not? A. Yes, sir.

Q. From November 1st on? A. Yes, sir.

Q. And also one of the directors?

A. Yes, sir.

Q. Do you recall, briefly, any discussion occurring

(Testimony of Malcolm A. Neal.)

about the cancellation of this license between you, and Mr. Hine, and Mr. Rees, after the row started on the 27th of October?

A. There were a great many discussions about it.

Q. What was said, if you can state, briefly, about the cancellation of the license, and giving you the contract, and making a new deal with you, a similar transaction with you?

A. We had a general understanding that if this agreement was cancelled that I would have the opportunity to go ahead under a new license agreement, and subsequently took the matter up with Mr. Ward, having met him accidentally in the matter in November, I believe.

Q. Mr. Ward was present, at your request, in the various courts, in the District Court of Appeal, and in the Superior Court—

Mr. BARRY.—Now, just a moment. I submit that that is entirely immaterial, your Honor.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Was Mr. Ward, the gentleman that was present in court, in Judge Murasky's court?

Mr. BARRY.—I urge the same objection, it is immaterial.

The COURT.—Objection sustained. [213]

Mr. ERSKINE.—Q. Who was Mr. Ward?

A. Mr. Ward was my partner in the Progressive Dehydrator Company during the year 1923, and until about January 26, 1924.

(Testimony of Malcolm A. Neal.)

Q. And the Progressive Dehydrator Company was the company that got this license after the other one had been cancelled? A. Yes, sir.

Q. Previous to the cancellation on January 12th, did this conversation occur to which you have just referred to, wherein it was understood, as you said, that you should have the license—was that previous to the cancellation?

A. Yes, sir.

Q. Who were present when you made that arrangement? A. May I ask what arrangement?

Q. The arrangement that you would have the license if the other one was cancelled.

A. That came up several times during the early part of November, prior to Mr. Ward coming into the situation, and then again with Mr. Ward, when he came into it.

Q. And he came into it prior to the time of the cancellation of the license? A. Considerably.

Q. Was any examination made by Mr. Hine and Mr. Rees into the question of Mr. Ward's financial responsibility? A. Yes, sir.

Q. And they satisfied themselves about that?

A. Yes, sir.

Q. And that was prior to the cancellation of the license? A. I believe so.

Mr. BARRY.—Just let him testify, will you please, Mr. Erskine?

Mr. ERSKINE.—Q. Mr. Neal, I will ask you if you, as president of the company, and as a director of the company, would have agreed to the

(Testimony of Malcolm A. Neal.)

cancellation of that license, or would have resisted it, if it were not for the fact that you made this other arrangement? [214]

Mr. BARRY.—I object to that question, if your Honor please, upon the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—Objection overruled. Answer the question.

A. I doubt if I would have allowed the license to be cancelled if I had not had my rights, as I considered them at the time, protected in the future.

Mr. ERSKINE.—Q. Did you ever tell Mr. Powell, or Mr. Lombard, that they were contemplating cancelling the license, and that you were contemplating taking the agreement—I mean prior to the cancellation?

A. I did not.

Q. Did you ever call to his attention, you being the president of the company at the time the license was cancelled, that there was going to be this meeting, and that there were these discussions, and that they—Lombard and Powell,—had better come and protect their interest? A. I did not.

Q. Nothing like that was done? A. No, sir.

Q. After the service of that notice upon you of January 12, where the license was cancelled, you took no action to prevent it, did you?

A. No, sir.

Q. Prior to the cancellation of the license, was any demand made upon you as president of the company for the payment of the back royalties?

(Testimony of Malcolm A. Neal.)

A. No, sir.

Q. Was anything said about making such a demand?

A. No. There were times when it was said that it was not wished to be made.

Q. Prior to that time of that cancellation, was any effort made that you know of to raise the money to pay these royalties?

A. None that I know of.

Q. None of you asked Lombard or Powell, that you know of, to agree to the use of these notes, or the use of the money in bank or the money available to take care of this royalty account? [215]

A. No.

Q. Did you ever have any conversation with Mr. Hine, and with Mr. Rees, or either one of them, about the entries in this book which we have just referred to which have been taken out?

A. Yes, I saw the book.

Q. What did the book show as you recollect it?

A. It showed a couple of pages of entries where certain notes were applied to both parties, and indicated that that was to pay the royalties.

Mr. BARRY.—I move to strike out that part of the answer, “and indicated that that was to pay the royalties.”

The COURT.—That may be stricken.

Mr. ERSKINE.—Q. You say, “indicated to pay the royalties”; how did you get that idea?

A. From the notations on the top of the page, where it was referred to as royalties, and from the

(Testimony of Malcolm A. Neal.)

conversation that I had when Mr. Rees showed me the book.

Q. What did he say to you when he showed you the book?

A. That these were divided between two of them on the payment of royalties.

Q. Do you remember how much that was? Do you remember the dates of those entries?

A. I do not recall the amount, but my best *recollect* is that there must have been five or six entries.

Q. Those were entries of notes which had been received—

Mr. BARRY.—Now, just a moment. Let him state what it was. I object to the form of the question on the ground that it is leading and suggestive.

The COURT.—Avoid leading questions, if it is material, at all. Proceed.

Mr. ERSKINE.—Q. What were the entries; were they of cash, or of notes?

A. Of notes.

Q. Were those notes the notes which had been taken by Mr. Rees [216] and Mr. Hine when they presented their statements to the corporation?

Mr. BARRY.—I submit that as much as the witness can do is to give his recollection of what appeared in the book. I object to the question as leading and suggestive.

The COURT.—Objection sustained.

(Testimony of Malcolm A. Neal.)

Mr. ERSKINE.—Q. What notes were they, Mr. Neal?

A. I do not recall all the names. To the best of my recollection there was a Kooser note, and some notes from Mr. Turner, which were rather long-term notes.

Q. At the risk of being leading, I want to ask you this: Were they notes that the Progressive Evaporator Company had received, or notes of some stranger?

Mr. BARRY.—I object to the question. All that the witness can do is to state his recollection of the contents, and the rest is for us to conclude, the Court included.

The COURT.—Objection sustained. Anything further with this witness?

Mr. ERSKINE.—Q. After the showing of that book, did you have any conversation with Rees, or with Hine, with respect to the right to cancel the license?

A. I had several conversations with Mr. Hine, where we discussed the situation, and there were statements between us that to the best of our knowledge we doubted if we had the technical right to cancel the license, inasmuch as the notes had been taken as payment on account, the royalty account, as well as the open account.

Mr. BARRY.—Q. Who said that, you or Hine?

A. Mr. Hine.

Mr. ERSKINE.—Q. Was that after the cancellation, as well as before?

(Testimony of Malcolm A. Neal.)

A. That was prior to the cancellation. [217]

Q. Did you ever take that question up with Mr. Powell, or with Mr. Lombard, or with the other directors, to see whether or not your doubt was correct? A. No, sir.

Q. After the row started on October 27, was any attempt made thereafter by you to carry on business for the corporation? A. None.

Q. Was any attempt made by you to get business for the Progressive Dehydrator Company?

A. Considerable.

Q. After November, and prior to the cancellation?

A. No, it was purely a matter of forming the new company.

Q. Up to that time. A. Yes.

Q. Did you use the prospects which you had from the Progressive Evaporator Company's business to get business? A. Yes, sir.

Q. And did you tell Mr. Hine and Mr. Rees that you were doing that?

A. Mr. Hine knew it; he had the letters right there on the desk, and I had access to them.

Q. What letters did he have on the desk?

A. Letters from various prospects.

Q. Where did you get the letters?

A. They were the property of the Progressive Evaporator Company for the year previous.

Q. He had them on the desk? A. In the desk.

Q. And you went and looked at them. Is that the fact? A. Yes, sir.

(Testimony of Malcolm A. Neal.)

Q. You were the president of the Progressive Evaporator Company? A. Yes, sir.

Q. Did you ever carry on any business at the place of business at the Humboldt Bank.

A. No, sir.

Q. It was an empty room, wasn't it?

The COURT.—That has been gone over before.

Mr. ERSKINE.—Q. Did you ever hear any conversation between [218] Mr. Lombard and Mr. Rees, or between Mr. Lombard and Mr. Hine, or either of them, with respect to taking these notes which we have referred to, not as security, but as payment?

A. Yes, sir.

Q. When did that occur? Was that at the time the last batch of notes was taken?

A. It was just about that time, or a little prior.

Q. What was said at that time?

Mr. BARRY.—I object to that because the record here shows that the notes were taken as security. That is the pleading, the sworn statement of Lombard, here. There is no issue here as to notes taken as payment. The bill of complaint says that the notes were taken as security.

Mr. ERSKINE.—I don't think it does state that, your Honor, but if it does I ask to amend it. I intended to state that they were taken as payment. They had \$4,000 in payment over and above the Rees Blowpipe account.

The COURT.—Show that to me in the complaint. There could be almost anything in that complaint,

(Testimony of Malcolm A. Neal.)

there is so much of it, but I would like to see that, if it is there.

Mr. BARRY.—Yes, your Honor, I will refer to the original complaint. On pages 15 and 16: “And the said Progressive Evaporator Company, Inc., gave to the said Rees, Hine, and the Rees Blowpipe Manufacturing Company, Inc., and they received and accepted from it, collateral security for any balance remaining unpaid on such statement after said cash payment.”

The COURT.—Objection sustained.

Mr. ERSKINE.—If your Honor please, I am going to ask leave to amend this complaint.

Mr. BARRY.—I submit that this is Mr. Lombard’s complaint, his sworn complaint. I object to any amendment. [219]

Mr. ERSKINE.—I ask leave to amend it to show that those notes were accepted as payment, and not as security. It was my impression, and I prepared this case on the theory that they were accepted as payment. That is what the witnesses have testified to, and will testify to.

Mr. BARRY.—I submit, your Honor, that if a motion is being made at this time, this is the sworn complaint of Mr. Lombard—

The COURT.—You object, do you?

Mr. BARRY.—Yes, your Honor, I object.

The COURT.—Parties come into court with the issues framed. They must be expected to support those issues. The objection is sustained. The

(Testimony of Malcolm A. Neal.)

other side cannot be expected to meet those changes when the case is on trial.

Mr. ERSKINE.—I am very sure, your Honor, there are places here in the complaint that clarify that matter.

The COURT.—If so you will find it later. Proceed with the witness.

Mr. ERSKINE.—The only point is that I will not have the witness here later.

The COURT.—The Court expects counsel to know his own case, and to be prepared with it, and to prepare it on his time, not on the Court's time. If you have anything further with this witness, proceed; if not, the witness will be excused.

Mr. ERSKINE.—Q. During the year that you were sales manager of this company, and before you were made president, was it called to your attention as a director and sales manager that none of the royalties were considered paid by Rees and Hine, and that they were applying these moneys in payment of other things?

A. No, sir.

Q. They never called that to your attention, did they? A. No, sir. [220]

Q. You filed a certificate of doing business with Mr. Ward, did you not, under the name of the Progressive Dehydrator Company, a photostatic copy of which I show you; you filed that in the Clerk's office in pursuance of the statute, did you not?

A. Yes, sir.

Q. And that is a photostatic copy?

(Testimony of Malcolm A. Neal.)

A. Yes, sir.

Mr. ERSKINE.—I offer this in evidence, your Honor. No objection, is there?

Mr. BARRY.—No objection at all. I think the pleadings admit it.

(The document was here marked Plaintiff's Exhibit No. 10.)

Mr. ERSKINE.—I think that is all, except may I ask your Honor's indulgence to examine this complaint during the cross-examination of Mr. Neal, to determine about that matter of payment?

The COURT.—Yes. Cross-examine.

Cross-examination.

Mr. BARRY.—Q. When did you first believe that none of these royalties had been paid? I will withdraw that question. When did you first believe that these royalties, or some of them, had been paid?

A. At no time.

Q. You never at any time, then, believed that the royalties had been paid: Is that correct?

A. That is correct.

Q. Your belief was that the royalties had not been paid: Is that not correct?

A. My belief was that I had nothing to do with the payment of bills for royalties, and I paid no attention to how those bills were rendered.

Q. As a matter of fact, you did not pay any attention to whether the royalties were paid or un-

(Testimony of Malcolm A. Neal.)

paid until some time after this controversy arose: Is not that correct? A. That is correct.

Q. It is a fact, is it not, that you brought Ward into that [221] transaction?

A. That is correct.

Q. Did you represent to Ward that Rees and Hine did not have a right to cancel that license agreement? A. No, sir.

Q. After Ward and yourself failed in the business of carrying on or selling these dehydrators, you brought a man by the name of Cornell into the arrangement, did you not?

Mr. ERSKINE.—That is objected to as assuming a fact not in evidence.

Mr. BARRY.—I will withdraw the question.

Q. Ward and yourself have dissolved your partnership, have you not? A. Yes, sir.

Q. And for sometime past you have not had any license agreement from Mr. Rees and Mr. Hine, have you? A. Not since it was cancelled.

Q. When was it cancelled?

A. I don't recall the exact date.

Q. Was it cancelled by consent? A. Yes, sir.

Q. Can't you give us the approximate date when it was cancelled?

A. I would say possibly in January, 1924.

Q. After that you brought a man by the name of Cornell into the picture, did you not?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent.

The COURT.—I think so.

(Testimony of Malcolm A. Neal.)

Mr. BARRY.—I just want to show, your Honor, that never at any time did he disclose to any of these people that there was any question about this license agreement having been properly terminated.

The COURT.—That might be true. If he was anxious to get in somebody he would very likely conceal that, if he thought that. Objection sustained.

Mr. BARRY.—Q. Have you made any arrangement with Lombard [222] as to what you would do with the Progressive Evaporator Company in the event that Lombard succeeded in this action?

A. No.

Q. Have you had any conversation with Lombard lately? A. Yes.

Q. You were not even on speaking terms with Lombard up to a short time ago, were you?

A. Yes.

Q. When did you resume your speaking relations with Lombard?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent, and as assuming a fact not in evidence.

Mr. BARRY.—I think this is very material, your Honor.

The COURT.—You may answer it. This is cross-examination.

A. Over a year ago.

Mr. BARRY.—Q. Up to that time you had not even talked to him if you met him on the street, had you?

(Testimony of Malcolm A. Neal.)

A. I have talked to him on the street.

Q. You had litigation with him, and you were a party to litigation before Judge Murasky, and in the Appellate Court, were you not? A. Yes.

Q. Your relations with him, at any rate, up to a year ago, were not very friendly, were they?

A. No.

Q. Did he come to you, or did you go to him?

Mr. ERSKINE.—I submit that that is not proper cross-examination, and immaterial, irrelevant, and incompetent.

Mr. BARRY.—We are weighing the effect of the testimony of this witness.

The COURT.—Objection overruled.

A. He came to my office.

Mr. BARRY.—Q. And then after that you went to his attorney's office, did you?

A. I have never been in his attorney's office.

Q. You have had a conference with Mr. Erskine, have you not? A. I have talked to Mr. Erskine.

[223]

Q. You talked to Mr. Erskine before you took the stand to-day about the testimony you would give, that is, the nature of your testimony, did you not? A. No.

Q. You have talked to Lombard, have you not, before you came here to-day?

A. I have talked to him.

Q. When did you last talk to Lombard?

A. Tuesday.

(Testimony of Malcolm A. Neal.)

Q. Your relationship with Lombard at this time is friendly, is it not? A. I don't know.

Q. Well, it is more friendly than it was up to a year ago, is it not?

A. It was more friendly prior to that time.

Q. You did not believe, did you, that any of these royalties were paid at the time that this notice of the cancellation of the license agreement was given, did you?

A. I was told that they had not been applied by Mr. Rees and Mr. Hine.

Q. You were told that they had not been applied toward the payment of royalties: Is not that the fact? A. Yes, sir.

Q. And you had no knowledge that any of those royalties had been paid prior to that time: Is not that correct? A. I knew nothing about it.

Q. When was it that you had any conversation with Hine, or with Rees, about the notes entered in that little book, when was the first conversation?

A. I would say approximately sometime in November.

Q. That would be November of 1922?

A. Yes, sir.

Q. And did you at that time say anything to Lombard about it? A. I did not.

Q. What did they tell you? Who spoke to you at that time, Rees or Hine? A. Both.

Q. What did they say to you?

A. That they had entered those royalties—that

(Testimony of Malcolm A. Neal.)

there was an excess amount of notes given to them, and they entered them as royalties. [224]

Q. Did they ever say that they entered them as royalties? A. Mr. Hine did.

Q. And they said that to you in November?

A. Several times.

Q. You claimed to have an arrangement with Rees and Hine under which you were entitled to \$15 a truck on the royalties that they received: Is not that correct?

Mr. ERSKINE.—I object to that as immaterial, irrelevant and incompetent, not proper cross-examination.

The COURT.—Objection overruled. He may answer.

Mr. ERSKINE.—Exception.

A. That was part of the arrangement we had when the corporation was formed, as it was a partnership with the three of us.

Mr. BARRY.—Q. That is, the three of you originally were in partnership. A. Yes, sir.

Q. And you say you had an arrangement by which you would get \$15 a truck?

A. I believe it was \$18; \$15 or \$18.

Q. Did Rees or Hine tell you in the course of that conversation how much these notes totaled that they had applied toward the royalties?

A. In the course of what conversation?

Q. In the conversation where they told you that they had applied some notes toward the royalties. Did they tell you what the notes amounted to?

(Testimony of Malcolm A. Neal.)

A. I saw it at the time, but I do not recall the amount.

Q. What is your recollection of the amount?

A. I have no recollection, as I have just said.

Q. You were interested in whether or not they were paid those royalties at that time?

A. I was.

Q. Yes, because you would be entitled to \$15 a truck if they were paid the royalties: Is not that correct?

The COURT.—He has answered that. Don't argue with the witness. [225]

Mr. BARRY.—Q. Did you ever demand at that time the payment of \$15 a truck from the royalties?

A. I believe I did; I am not positive.

Q. Mr. Neal, I want to get your positive recollection, or as nearly positive as you can give it. Don't you know, as a matter of fact, that you never said a word at any time to Rees and Hine about \$15 a truck being due to you upon royalties that had been collected? A. No, I do not.

Q. Will you say that you ever said anything of that kind to them? A. Anything of what kind?

Q. To the effect that you had some money coming because they had collected royalties.

A. When that book was shown me I spoke to them about my percentage of it.

Q. What did you say to them?

A. I don't recall the exact conversation, because I don't recall the exact amount of the notes shown

(Testimony of Malcolm A. Neal.)

on that, and that notes had not been collected, to the best of my knowledge.

Q. Why did you say a minute ago that you thought you said something of that kind, and now you say positively that you said it?

A. Because I still believe that I did bring that up when that was shown me, and those credits were placed in that book.

Q. When was that, about what date?

A. I told you a while ago I thought it was sometime in November.

Q. And do you wish the Court to understand that even though you had that knowledge at that time, that you permitted the cancellation of this license agreement on January 12 without any objection from you?

A. Yes, because I was thoroughly advised by you.

Q. Thoroughly advised about what?

A. About cancelling the license agreement.

Q. Was anything ever said to me at any time about any royalties [226] being paid?

A. I don't know.

Q. You had at least 100 conversations with me, did you not? A. I doubt it.

Q. You had at least 100 conversations with me in my office, with Mr. Rees and Mr. Hine present. Was anything ever said at any time to me about any of those royalties having been paid?

A. I don't recall.

(Testimony of Malcolm A. Neal.)

Q. Don't you recall that nothing of the kind was ever said? A. No, I do not.

Q. When that license agreement was cancelled, or the notice of cancellation given, you were in touch with Ward, were you not? A. Yes.

Q. Did you say anything to Ward at that time, or at any other time, to the effect that some of those royalties, or that the royalties, had been paid?

A. I don't believe I discussed that royalty account with Mr. Ward; it was none of his business.

Q. It was his business whether or not he had a valid license agreement with the Progressive Evaporator Company, was it not?

A. We took that gamble. That is the reason I invited him to go to court, to be present at the hearings.

Mr. ERSKINE.—Your Honor, I object to that as argumentative.

The COURT.—Part of it was, and part of it was not. However, the case is being tried before the Court. The Court will ignore what is not competent or material.

Mr. BARRY.—Q. Mr. Neal, you recall, do you not, that at the time Rees and Hine had the license arrangement with Cornell, that Cornell was actually agreeing to buy the patents. Is that not correct?

A. Yes, sir.

Q. It was not a license agreement, it was an agreement to purchase the patents, was it not?

A. I believe so. [227]

(Testimony of Malcolm A. Neal.)

Q. Did you say anything at that time to Cornell, or anyone connected with Cornell, about any trouble that may arise because these royalties were not paid?

A. Yes, that was thoroughly understood by Mr. Cornell, and I even assigned my interest in the corporation on account of that.

Q. Did you tell Cornell that these royalties had been paid? A. I did not.

Q. Then it is a fact, is it not, that you never at any time disclosed to Cornell that the royalties had been paid, did you? A. No, sir.

Q. You were the sales manager of this company, were you not, of the Progressive Evaporator Company? A. Part of the time, I believe.

Q. Can you tell us just what the total amount of those notes was that you say were applied toward royalties? A. No, I cannot.

Q. How much did they aggregate? Did they go as high as \$7,000?

A. I don't know; I just answered that question.

A. You cannot tell us whether they were as much as or less than \$7,000?

A. I could not tell you now.

Q. How much of a demand did you make upon Rees and Hine for your share of the royalties?

A. A very weak demand.

Q. When you say a very weak demand, how did you put it to them?

A. I asked if I was to get my \$15 a truck when those notes were paid, and they said yes.

(Testimony of Malcolm A. Neal.)

Q. You asked them whether you would get your \$15 a truck when those notes were paid?

A. Yes, sir.

Q. You did not ask for the \$15 at that time, did you? A. No, sir.

Q. And that was because the notes were not paid at that time: Is that not correct? A. Naturally.

Q. Have you got a letter that you signed down in the office of [228] Mr. Elkus, on May 12, 1924, in which you recited that you believed that the license agreement had been legally and properly cancelled? A. No, sir.

Q. Have you any of the documents that were signed by you down in the office of Mr. Elkus at that time? A. No, sir.

Q. You received a commission, did you not, from Rees and Hine at that time, a part commission in cash, for effecting that sale to Cornell: Is that not correct? A. Yes—

Mr. ERSKINE.—If your Honor please, I was going to object but he has answered it.

The COURT.—What is the object of this?

Mr. BARRY.—To show how this man was acting during this period of time, and how he did a number of things absolutely inconsistent with his testimony now given.

The COURT.—When did this transaction occur with Cornell?

Mr. ERSKINE.—A year and a half or two years after the cancellation of this license.

The COURT.—It sounds a little remote, still he

(Testimony of Malcolm A. Neal.)

may answer it. It might or might not have an effect on his testimony.

A. (Continuing.) The agreement that I had regarding the \$5,000 commission was drawn up by Mr. Barry, himself. I submitted it to my attorney, Mr. Bradley, and called his attention to the fact—

The COURT.—Read the question to the witness. (Question read.) Answer the question directly.

A. (Continuing.) I only received a part. The commission amounted to \$5,000, and I believe I received \$500, or something like that.

Mr. BARRY.—Q. Did it call for graduated payments as payments were made by Cornell to Rees and Hine? A. Yes, sir.

Q. Were you acting in good faith when you were acting with [229] Cornell in connection with this matter? A. Absolutely.

Mr. ERSKINE.—Just a moment, I object to the question upon the ground that it is immaterial, irrelevant, and incompetent, and not binding on us, and not proper cross-examination.

The COURT.—It calls for a conclusion. Objection sustained.

Mr. BARRY.—Q. As a matter of fact, during the time that Lombard was functioning as president of this corporation, and Powell as secretary, you did not concern yourself with whether royalties were paid, or were not paid, did you?

A. No.

(Testimony of Malcolm A. Neal.)

Q. Do you remember a time, Mr. Neal, when a large number of notes were turned over to Mr. Hine, or Mr. Rees? A. Approximately, yes.

Q. Do you recall that at that time there was a conversation that took place about his getting notes of an aggregate value more than the amount of the indebtedness?

A. I remember something to that effect.

Q. You raised that question at that time, did you not? A. I don't recall.

Q. Don't you recall that you, at that time, in substance, said, "These notes that you are getting are in excess of the amount of the indebtedness." Do you recall that? A. I do not.

Q. But you recall something of that kind being said?

A. Something along that line. That point came up.

Q. That is, about these notes being greater in amount than the indebtedness due to the Blowpipe Company.

The COURT.—The witness has already answered it. Don't repeat his testimony.

Mr. BARRY.—Q. Is it not a fact that the aggregate amount of those notes was less than the total due to the Rees Blowpipe Manufacturing Company on the manufacturing account, and due to Rees and Hine on the royalty account? [230]

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent, and not the proper cross-examination.

(Testimony of Malcolm A. Neal.)

The COURT.—Objection sustained.

Mr. BARRY.—Q. It is a fact, is it not, Mr. Neal, that Mr. Rees and Mr. Hine, both, told you that they would not enter into any kind of an arrangement with you and Ward until the license agreement had been cancelled by them. Is not that correct?

A. Yes, I believe so.

Q. It is a fact, is it not, that nothing was done toward drawing up an agreement between Rees and Hine, as patentees, and yourself and Ward, until after the license agreement was terminated: Is that correct? A. No, I do not believe so.

Q. This agreement is dated February 14, 1923, a month after the license agreement was terminated, assuming that the termination was proper. Is it not a fact that this agreement was prepared by attorneys for both of you between the time that the license agreement was cancelled and the date that that agreement bears?

A. Yes, but we had done considerable work on that prior to the cancellation.

Q. You had not done any work on the agreement, had you?

A. Not on the technical point of drawing it up.

Q. That is what I am getting at. You had not done anything about drawing it up.

A. Only discussed the points to be incorporated in the agreement.

Q. Don't you recall that Rees and Hine told you that they would not even discuss the matter of a

(Testimony of Malcolm A. Neal.)

contract with Ward until such time as the license agreement had been canceled by them?

A. No, sir, because they did.

Q. Is it not a fact that they told you they would not discuss the matter of a new agreement with Ward until after the old license agreement had been canceled? A. No, sir. [231]

Q. Mr. Neal, why is it that you are assuming a different position with reference to this matter today than you did in 1922, at a time when the license agreement was cancelled?

Mr. ERSKINE.—If your Honor please, that is objected to as immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained. Anything further that is material?

Mr. BARRY.—Yes, your Honor.

Q. Do you recall the Kooser and the Turner notes as being in that list of notes mentioned upon these sheets? A. I believe so.

Q. Apart from those two notes, you have no memory of what the sheets showed, have you?

A. Except that on both pages there were approximately five or six items mentioned.

Q. Is it not a fact that Mr. Hine or Mr. Rees told you at that time that if it became necessary to do so, and they accepted any notes in payment on the royalty account, that those were the notes that they would propose to Lombard and that they would accept?

(Testimony of Malcolm A. Neal.)

A. No; as I understood it, those notes had been segregated to pay the royalties.

Q. You mean in full payment of the royalties?

A. No.

Q. You do not mean that the notes were in full payment of the royalties, do you?

A. I did not know what the amount of those notes was.

Mr. BARRY.—That is all.

Redirect Examination.

Mr. ERSKINE.—Q. But Hine did tell you that he considered that those entries in that book made *in* doubtful whether or not he could cancel the license?

A. Yes, sir.

Q. And he told you that before he did cancel it?

A. Several times. [232]

Q. Did you call the attention of Mr. Barry, when this contract was being drawn for you to take the license, did you call his attention to the fact of the existence of that book?

A. I did call Mr. Barry's attention to the existence of that book, and he in very plain words asked me if I was going to be a traitor, and I told him that if I had to take the stand I would tell the truth.

Q. Now, in respect to the \$15, you were more interested, were you not, in getting this new license for yourself, rather than in getting the \$15 royalty on the various trucks or various devices that had

(Testimony of Malcolm A. Neal.)

been sold by the Progressive Evaporator Company at that time? A. Naturally.

Q. You spoke here about when the deal with Cornell was made, about assigning your interest in the Progressive Evaporator Company to protect somebody against the outcome of this suit; you remember that, do you not? A. Yes.

Q. Who suggested that? A. Mr. Barry.

Q. And what was that?

A. That was an assignment wherein I assigned—

Mr. BARRY.—Just one moment. Can't we have that agreement? Q. Have you got it?

A. No, I have not. Mr. Bradley has the paper, and he is away on his vacation.

Mr. BARRY.—Your Honor, that is a paper that undoubtedly can be produced. I would like to have the best evidence on that.

The COURT.—I hear counsel speaking, but if he is making any objection, the Court does not so understand it.

Mr. BARRY.—I object to the question on the ground that it calls for the contents of a written instrument, and no foundation has been laid, and the instrument is the best evidence.

The COURT.—Objection sustained. Proceed, if you have [233] anything further.

Mr. ERSKINE.—Have you a copy of that paper, Mr. Barry?

Mr. BARRY.—I am looking for it very strenuously.

(Testimony of Malcolm A. Neal.)

Mr. ERSKINE.—I served a subpoena to produce all of these papers.

Mr. BARRY.—Yes, you had an omnibus subpoena covering everything in the world—

Mr. ERSKINE.—But I didn't know the facts. I will ask leave to put that in when it is discovered.

Q. You were asked what the conversation was in respect to a large bundle of notes which were given Mr. Rees sometime in October; what was said at that time with respect to those notes?

A. My understanding is that Mr. Lombard gave him those notes because he agreed to finance the corporation, and that—

Mr. BARRY.—Just one moment, your Honor. I ask that that be stricken out.

The COURT.—Stricken.

Mr. ERSKINE.—Q. Do you know what those were for?

A. On the account which was rendered to ourselves by the Rees Blowpipe Manufacturing Company.

Mr. ERSKINE.—That is all.

The COURT.—Call your next witness. Vacate the stand. Call your next witness, if you have one.

TESTIMONY OF LORING POWELL, FOR
PLAINTIFF.

LORING POWELL, called for the plaintiff,
sworn.

Mr. ERSKINE.—Q. What is your business?

A. Bookkeeper for the Michigan Tire Company.

(Testimony of Loring Powell.)

Q. Were you employed by the Progressive Evaporator Company? A. Yes. [234]

Q. What was your position with them?

A. Secretary and treasurer.

Q. During what time, and up to when?

The COURT.—If you know, say so; if you don't know say so.

A. Well, I suppose it was until November 1st.

Mr. ERSKINE.—Q. After that time were you ever again employed by Mr. Rees, or Mr. Hine?

A. Yes, sir.

Q. After November 1st? A. Yes, sir.

Q. Where were you employed by them?

A. In their Los Angeles branch.

Q. That was in 1923, was it not? A. Yes, sir.

Q. Of what company?

A. The Rees Blowpipe Manufacturing Company.

Q. Did you ever return to San Francisco, and were you still employed by them up here?

A. For a while.

Q. Were you employed by them up here after your return to make entries in the Progressive Evaporator Company's books? A. After my return?

Q. Yes, after your return from Los Angeles. After your employment by them in Los Angeles, were you employed by them in San Francisco to make any entries, or to write up the Progressive Evaporator Company's books?

A. Not after I returned from Los Angeles.

Q. Were you employed by them prior to your

(Testimony of Loring Powell.)

going to Los Angeles to write up the Progressive Evaporator Company's books? A. Not prior.

The COURT.—If this witness knows anything, bring him to it.

Mr. ERSKINE.—Q. Were you employed by them after you were ousted as secretary to write up the company's books? A. Yes.

Q. When was that?

A. While I was employed in their Los Angeles office I was asked to come to San Francisco to work on the [235] books of the Progressive Evaporator Company, Inc.

Q. And you came, did you? A. Yes, sir.

Q. Were your expenses paid by the Rees Blowpipe Manufacturing Company?

A. They were advanced by the Rees Blowpipe Manufacturing Company, I believe.

The COURT.—Well, the material thing is he came to make these entries.

A. (Continuing.) It was a charge against the Progressive Evaporator Company.

The COURT.—Come to what is material, if this witness knows anything.

Mr. ERSKINE.—Mr. Barry, will you produce the journal and ledger of the Progressive Evaporator Company?

Mr. BARRY.—Yes, these two.

Mr. ERSKINE.—I want to call your attention to the ledger of the Progressive Evaporator Company, and particularly to Notes Receivable discounted, and to the royalty account. Let me call your at-

(Testimony of Loring Powell.)

tention to certain entries that are made here as of December 31, 1922. Were those made after you came up from Los Angeles?

A. No.

Mr. BARRY.—Those were not made by him at all.

Mr. ERSKINE.—Q. Were those made by you while you were secretary of the company?

A. I never made those.

Q. Did you make any entry while you were secretary of the company, or was any entry made by a bookkeeper under your direction of a separate royalty account?

A. I don't think so. I think it is shown here.

Q. Show me where it is shown. You are familiar with these books and I am not.

A. Are you referring to the liability account for royalties?

Q. Yes, any account where you had royalties. I want to show [236] how they were kept by you.

A. I had an expense account for royalties, to which the amount of the royalties were charged as an expense of the business; and then I made a credit to the Rees Blowpipe Manufacturing Company.

Q. And that is the way they were all carried, in the Rees Blowpipe Manufacturing Company, while you were secretary. Is that the fact?

A. Yes, sir.

Q. On your return from Los Angeles, did you

(Testimony of Loring Powell.)

make any entries in the books, changing them to Rees and Hine?

A. You mean at the time that I came up to work on these books?

Q. Yes.

A. I am inclined to think that I did make that change, but I don't seem to see the account here.

Q. Let me call your attention to this account here which is referred to in this royalty account of Hine and Rees, entered on December 31, 1922, referring to journal entry No. 52. This shows on that date the Rees Blowpipe Manufacturing Company, on the credit side, \$3,630, to each one of them, and nothing, apparently, on the debit side. Do you know whose handwriting that is in?

A. You asked me whether I had done that, and now it appears evident that I did not do it, because I see now that someone else has done that.

Q. That was entered after you gave up your position as secretary of the company? A. Yes, sir.

Q. I call your attention to journal entry 52. This is the journal entry, the entry referred to in that ledger entry. Is that entry in your handwriting on page 52 *on* red ink? A. Yes, sir.

Q. That is in your handwriting, is it?

A. Yes, sir.

Q. Was that entry made by you at their request, at Hine and Rees' request, after you returned from Los Angeles, and while you were in their employ, and when you came up from Los Angeles [237] to work on the books?

(Testimony of Loring Powell.)

A. It looks as though I made that in December, 1922.

Q. Under whose direction? What entries did you make when you came back from Los Angeles while you were working for Rees and Hine?

A. I perhaps made these entries over here. It is hard for me to say whether I wrote these up in December, 1922, or at the time I came back, antedating the work to correspond to the period to which it applied.

Q. Let me call your attention to this entry made in red ink, and perhaps it will refresh your memory. Journal entry, "\$7,260, Rees Blowpipe Manufacturing Company, Royalties due C. Rees and C. Hine as individuals erroneously credited to Rees Blowpipe Manufacturing Company." And then, on the credit side: "C. Rees, royalty account; C. Hine, royalty account." Don't you recollect that that is one of the entries you made after your return?

A. I am inclined to think I made this on my return.

Q. Let me call your attention to this fact, to the entry as it originally stood in the books. "Note receivable discounted." Those entries are in your handwriting, are they not? A. Yes, sir.

Q. I call your attention to the fact that all of the notes receivable discounted were from June 27th down to October 9th, amounting to \$43,682.50; they are discounted to the Rees Blowpipe Manufacturing Company. A. Yes.

(Testimony of Loring Powell.)

Q. And a debit entry to the Rees Blowpipe Manufacturing Company of \$39,857.50. A. Yes, sir.

Q. Now, in this journal, on page 52, I call your attention to this entry: That is in your handwriting, too, is it not? A. Yes, sir.

Q. The entry is a journal entry on the debit side, \$39,857.50, notes receivable discounted, notes receivable turned over to [238] Rees Blowpipe Company as collateral security on open account recorded as notes receivable discounted in error. That is your handwriting, isn't it? A. Yes, sir.

The COURT.—What does all this mean?

Mr. ERSKINE.—I am getting at the fact that this was changed after his return.

The COURT.—Just ask him that.

Mr. ERSKINE.—Q. That entry was also made after your return?

A. Yes, sir.

Q. And in accordance with Rees and Hine's instructions?

Mr. BARRY.—Now, don't lead the witness, please; let us get the facts.

Mr. ERSKINE.—I offer these two accounts in evidence, the notes receivable account, and the royalty account, and the journal entries that were referred to.

The COURT.—What do they all mean when you have them in? That is what the Court would like to know.

Mr. ERSKINE.—They will show that these notes were taken in payment of this indebtedness, and

(Testimony of Loring Powell.)

afterwards they were changed on the books to show they were taken as security.

The COURT.—Well, they will show for themselves. They are in evidence.

(The books were here marked, respectively, Plaintiff's Exhibits Nos. 11 and 12.)

Mr. ERSKINE.—Q. Do you recollect when the last batch of notes was handed to Mr. Rees by Mr. Lombard?

A. Yes, sir.

Q. Do you recollect what was stated at that time, and what was said? Just tell us in your own language, as briefly as possible, what was said.

A. Of course, I don't remember the exact words, except that Mr. Lombard stated that he had had difficulty in raising cash on the notes, and finally Mr. Rees [239] said, "Well, give them to me, I will hock them," or words to that effect.

Q. Was anything said with respect to a discount?

A. Yes, it was understood that they were to be discounted.

Q. Who was to be charged with the discount?

A. We were.

Q. You were?

A. The Progressive Evaporator Company.

Q. Was anything said with respect to the interest that had accrued up to that date on those notes?

A. Well,—

The COURT.—Q. Was there or was there not?

A. There was.

Mr. ERSKINE.—Q. What was said?

(Testimony of Loring Powell.)

A. I said that I thought we should receive the benefit of the interest accrued from the date of the notes to that date, and Mr. Rees said, "Well, how about our account, which has been standing for some time, we are entitled to some consideration." And Mr. Lombard allowed that that was right.

Q. He said that that was all right?

A. Yes, sir.

Q. That Mr. Rees could have the interest that accrued to date? A. Yes, sir.

Q. When was that? Was that some time in October, do you recollect?

A. It was some time in October.

Mr. ERSKINE.—That is all.

The COURT.—Cross-examine.

Cross-examination.

Mr. BARRY.—Q. Mr. Powell, you say this was some time in October. The entries made concerning that matter were made on September 30th, were they not?

A. I may have been mistaken, it may have been September. That was just my guess that it was October.

Mr. ERSKINE.—What entries are they?

Mr. BARRY.—All these entries here.

Q. Is it not a fact that entries were made by you on September [240] 30th of these notes that had been turned over to Rees or Hine, or, rather, turned over to the Rees Blowpipe Manufacturing Company? A. Yes, sir.

(Testimony of Loring Powell.)

Q. There was not any discount on any account of any kind allowed to the Rees Blowpipe Manufacturing Company, was there? A. No.

Q. Did you not hear Mr. Rees say in the course of that conversation that an attempt had been made to discount these notes at 12½ per cent, without any success?

A. You mean after he had received the notes?

Q. Just about the time that the notes were turned over to him.

A. That Mr. Rees said that he had tried to discount those notes?

Q. Yes, or that Lombard had tried to discount the notes, but without any success?

A. I don't know that Mr. Lombard said that he had tried to discount them for a certain amount, but he had made an effort to raise cash on those notes, and had not succeeded.

Q. You entered all these notes up to the Rees Blowpipe Company at their face value, did you not? A. Yes, sir.

Q. There was no discount allowed them at all, was there? A. No, not at that time.

Q. Was there at any time any discount allowed to them?

A. No, there was not, but I understood that they were to let us know the amount of the discount, and then I was going to enter it in.

Q. How was the discount to be reckoned, what discount was to be allowed?

A. I believe it was about 12 per cent.

(Testimony of Loring Powell.)

Q. Is there any entry in these books from September 30th up to the time that this controversy arose on October 24th, showing that Rees and Hine got any benefit of a discount in connection with these notes?

A. I don't believe there is. [241]

Q. As a matter of fact, when the notes were turned over to Rees you entered them in the book as though Rees had accepted them as part payment. Is not that correct? A. Yes, sir.

Q. Don't you recall there was a conversation at that time in which Mr. Neal, or someone there present, objected to so many notes being turned over to Rees because the amount of those notes was greater than the amount that was owing to the Rees Blowpipe Manufacturing Company?

A. I am not sure of that.

Q. Did you hear any conversation at any time about the amount of notes turned over to Rees being in excess of the indebtedness?

A. I am not sure on that.

Q. Was there anything said at that time as to why these notes were being turned over?

A. It was evident that they were being turned over because of the indebtedness to the Rees Blowpipe Company.

Mr. BARRY.—I move to strike that out, your Honor.

The COURT.—Stricken out.

Mr. BARRY.—Q. Will you state what the conversation was concerning the matter, if any?

(Testimony of Loring Powell.)

A. We owed the Rees Blowpipe Company money, and Mr. Rees wanted a settlement of the account. We showed him that we did not have enough cash, and then he considered receiving notes.

Q. Did the different parties there have any statement before them at that time concerning the indebtedness dues from the Progressive Evaporator Company to the Rees Blowpipe Company?

A. I am sure they did.

Q. Now, I show you some statements that purport to have been rendered by the Rees Blowpipe Company to the Progressive Evaporator Company, and I particularly call your attention to a statement dated October 6th, showing that at that time there was a balance due of \$21,212.01, from the Progressive Evaporator [242] Company to the Rees Blowpipe Company. You received that statement, did you not?

Mr. ERSKINE.—If your Honor please, I object to all references to this statement, on the ground that it is immaterial, irrelevant, and incompetent, and not proper cross-examination.

Mr. BARRY.—This is cross-examination of this witness, your Honor.

Mr. ERSKINE.—I did not ask this witness anything about these statements. I simply asked him what was said when Mr. Rees took these notes.

Mr. BARRY.—I certainly am entitled to cross-examine the witness.

The COURT.—Yes, but there is a limit to it.

(Testimony of Loring Powell.)

Mr. BARRY.—I have just started with this matter, your Honor.

The COURT.—I cannot see any point to it.

Mr. BARRY.—There is a statement here showing an indebtedness of \$21,000. I want to follow that up by showing that there was no objection made at any time to this statement, or to the correctness of the statement.

The COURT.—That is not cross-examination. Objection sustained.

Mr. BARRY.—Q. I show you a statement dated October 26, 1922, and I ask you whether that statement was received by you.

Mr. ERSKINE.—I object to that on the same grounds.

The COURT.—That is merely preliminary.

A. That was not received by me.

Mr. BARRY.—Q. It was not received by you?

A. At least not on the day that it was presented. I think that was presented on the following day.

Q. Mr. Powell, you recall, do you not, that when payments were [243] made by the Progressive Evaporator Company to the Rees Blowpipe Manufacturing Company, that statements were rendered by the Rees Company showing how those payments were applied. Is not that correct? You got statements from time to time showing how the payments were applied. Is not that correct?

Mr. ERSKINE.—That is different from your first question.

(Testimony of Loring Powell.)

Mr. BARRY.—Well, I am putting the question now, and I submit to your Honor that it is a proper question.

The COURT.—Answer the question, if you know.

A. Showing how some of the payments were applied, at least.

Mr. BARRY.—Q. Going back to the statement here dated July 28, 1922, you recall seeing that statement at or about the time that it reached your office, do you not?

Mr. ERSKINE.—If Mr. Barry wants to make this witness his own, let him do so.

The COURT.—Yes. Come within the rules, or else abandon your examination altogether.

Mr. BARRY.—Very well, your Honor.

Q. In this book you kept a separate account known as a royalty account, did you not, Mr. Powell?

A. A royalty expense account.

Q. A royalty expense account? A. Yes.

Q. I direct your attention to two accounts, here; one on an unnumbered page, "Reserve for royalties on unshipped plants"; that is correct, is it not?

A. Yes, sir.

Q. That was kept by you up to the time this trouble arose in October, 1922? A. Yes, sir.

Q. There is another account which refers to royalties, is there not? A. Yes, sir.

Q. Will you kindly find that for me? I direct your attention to [244] an account there marked "Royalties." Was that account kept by you?

(Testimony of Loring Powell.)

A. Yes, sir.

Q. And kept by you prior to the time this trouble arose? A. Yes, sir.

Q. That account shows a total of \$7,260.

A. Yes, sir.

Q. As royalties earned during that period.

A. Yes, sir.

Q. Under whose direction was it that you made the entries in that book dated September 30, 1922, showing that these different bills receivable were charged to the Rees Company?

Mr. ERSKINE.—That is objected to on the ground that it calls for the conclusion of the witness. This gentleman was the secretary of the company, and, under the by-laws, he was to keep the books.

The COURT.—Objection overruled.

A. Under the direction of Mr. Lombard.

Mr. BARRY.—Q. Did Mr. Lombard have any conversation with you at or about that time as to how you would make entries concerning those notes?

A. I had held the matter in abeyance —

The COURT.—Read the question to the witness.

(Question read.) Answer “Yes” or “No.”

A. Yes.

Mr. BARRY.—What conversation did you have with him at that time about that subject matter?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent, not proper cross-examination.

The COURT.—What notes are these?

(Testimony of Loring Powell.)

Mr. BARRY.—These are the notes that were entered on September 30th.

The COURT.—I don't see that it is proper cross-examination. Objection sustained.

Mr. BARRY.—Q. I show you a statement of notes, due dates, [245] and the dates of the notes, themselves, and I ask you if it is not a fact that that memorandum was made out by you at or about the time that all of the notes were turned over to Mr. Rees on September 8th?

Mr. ERSKINE.—Just a moment. May I look at this before I make my objection?

The COURT.—Are these the notes that, on direct examination, he testified that Lombard had given to Rees because it was difficult to get cash on them?

Mr. BARRY.—Yes, your Honor, the same notes.

The COURT.—You may proceed with that.

Mr. ERSKINE.—Will your Honor bear with me for just a minute, because I have never seen this before.

Mr. BARRY.—I have another one you never saw before; I will give them both to you at the same time.

The COURT.—Proceed.

A. May I state that those notes you have there are not the same notes that I referred to that were to be discounted?

Mr. BARRY.—Q. These are not the same notes?

A. No. It seems to me that was in October.

Q. I show you a statement containing a list of notes and which purports to show a receipt by Mr.

(Testimony of Loring Powell.)

Rees of those notes on September 8th; I will ask you if that is the list of notes to which you refer?

A. No.

Q. I show you a statement of two notes, dated October 9, 1922, and I will ask you if that is the statement of two notes to which you refer?

A. No.

Q. It is a fact, is it not, that a receipt was taken by you from Rees under date of September 8, 1922, for a number of notes turned over to him at that time. Is that not correct?

Mr. ERSKINE.—I object to that as not proper cross-examination. [246]

The COURT.—The Court understands he is asking about the notes which you asked about on direct examination, the notes that Lombard gave to Rees, and what he said.

Mr. ERSKINE.—I understand he says that the list does not apply to those notes.

The COURT.—Proceed with the examination.

Mr. BARRY.—Q. It is a fact that a receipt was taken by you from Mr. Rees on or about September 8th, when the notes referred to in this statement were turned over to him. Is not that correct?

A. This appears to be a true copy of a list, although it is not—

The COURT.—Q. You were asked if you took a receipt.

A. I believe there was a batch of notes just like that turned over to Mr. Rees, for which I took a receipt.

(Testimony of Loring Powell.)

Mr. BARRY.—Q. You will notice that on this list it says at the top, “Progressive Evaporator Company, Inc.,” and at the bottom it says, “The above notes were received by C. Rees on September 8, 1922.”

Mr. ERSKINE.—I object to this as immaterial, irrelevant, and incompetent, and it is getting a written instrument in evidence without reading it in evidence.

The COURT.—I will say now frankly that both of you are trying your best to get in one side of the case and not all of it, and you are not disclosing all of it to the Court. You will not succeed, either of you. Let the objection be overruled.

Mr. BARRY.—Q. This is the list of notes that were given by Lombard to Rees on or about September 8, 1922, the date shown on the receipt. Is that not correct?

A. I believe that a number of notes were given to Rees about that time, but that is not a receipt, or a certified copy of a receipt, so I cannot [247] say whether they are the same ones.

Q. I show you a receipt dated October 9, 1922, signed, or purported to be signed by C. Rees; I will ask you if that is a receipt received by you from Mr. Rees at the time that two notes were turned over to him actually as payment and not as security?

A. What I said with reference to that other one holds in regard to this; that is an unsigned receipt, it is not certified.

(Testimony of Loring Powell.)

Q. Is it not a copy?

The COURT.—He says he doesn't know. Proceed with something else.

Mr. BARRY.—Q. Have you the original of a receipt dated October 9, 1922, signed by Mr. Rees, acknowledging the receipt of two notes on account?

A. I have not any papers.

Mr. ERSKINE.—You are in possession of all those papers,—

Mr. BARRY.—Now, Mr. Erskine, we are not holding back anything here at all.

Mr. ERSKINE.—I was not intending to charge you with that.

The COURT.—If you have anything further to bring out from this witness, proceed.

Mr. BARRY.—Very well, your Honor.

Q. You were the one who made the entry under date of December 31, 1922, correcting this book by showing that some \$39,000 in notes which had been charged up on the account as payments on account to Rees and Hine had been received by them as security. Is not that correct?

A. Yes, I made the entry referred to.

Q. You made the entry referred to, that is, correcting the previous entries that were made; that is correct, is it not? A. Yes, sir.

Q. In connection with this matter, you went over these books with an accountant by the name of Glendenning, connected with [248] Bullock and Kellogg? A. Yes, sir.

Q. And both of you worked together on these

(Testimony of Loring Powell.)

books at or about the time that these changes were made? A. Yes, sir.

Q. And these changes were made with the accountant going over the books for the purpose of trying to reconcile the books, were they not, for the purpose of rendering statements to the Federal Government, and others; is not that correct?

A. Yes, sir.

Q. And it was about that time that this accountant opened this other account know as the royalty account of Rees & Hine, showing that there still remained unpaid to Rees & Hine \$3,000 on royalty, that is, to each of them. A. Yes, I think it was.

Q. When you say that these notes were to be discounted, was there anything said at that time about Rees or Hine getting any specific discount. Was that discount decided on?

A. I am not sure whether it was definitely decided on. There was a little indecision about that.

Q. Is it not a fact, Mr. Powell, that at that time Mr. Rees said, in substance, that now that you, Lombard, have not been able to hock these notes—using his own expression, let me have the notes and see if I can hock them and raise money on them; is not that correct?

A. I don't know whether he put it that way.

The COURT.—He has already testified he said that Rees had said he would try and discount them. What difference does it make what the words were?

(Testimony of Loring Powell.)

Mr. BARRY.—Q. Is it not a fact that you were awaiting word from Rees as to the percentage he was compelled to pay for the purpose of discount, and that Rees was to give you that information at a later date. Is not that correct?

A. I was waiting for some information in regard to the discount; [249] I am not sure whether it was the rate, or not. I think that they were to make a computation of the discount and interest and render me a statement on it.

Q. But you had never received any statement of discount and interest, had you? A. No.

Q. And you charged these up to Rees and Hine at their face? A. Yes, sir.

The COURT.—I think you have covered the ground. Any redirect?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Proceed.

Redirect Examination.

Mr. ERSKINE.—Q. You referred to entries in the royalty account and said that that was made under Mr. Lombard's direction. Were all those entries made while Mr. Lombard was still the president of the company?

A. What royalty account do you refer to, to the expense account?

Q. Yes.

A. I made all those entries in the royalty expense account while I was secretary of the Progressive Evaporator Company.

(Testimony of Loring Powell.)

Q. None of those were made after your return?

A. No.

Q. Now, to clear up the matter of these notes, you referred to a large bundle of notes which at some time in the end of September or October were given to Mr. Rees, and which he said he would take out and hock? A. Yes, sir.

Q. Are those the notes, the notes that were in this list which Mr. Barry referred to? (Addressing Mr. Barry.) Did you introduce that in evidence.

Mr. BARRY.—No, you would not allow me to.

Mr. ERSKINE.—Q. (Continuing.) Which Mr. Barry has shown you in this list which he called to your attention.

A. It may [250] be that some of those notes in that list were in the later batch.

The COURT.—Has this list been introduced in evidence?

Mr. BARRY.—I wished to put it in evidence, but counsel objected to it at that time.

The COURT.—Very well, then, there is no inquiry about it. There is nothing before the Court. Proceed, if you have anything further of this witness.

Mr. ERSKINE.—Q. When you were working with these auditors, Bullock & Kellogg, when you were making these changes in the books, they were in the employ, at that time, of the Progressive Evaporator Company, which at that time was being managed and controlled by Rees, and Neal, and Hine. Is not that correct?

(Testimony of Kathleen Daniels.)

Mr. BARRY.—I object to the question as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained. Anything further?

Mr. ERSKINE.—That is all.

TESTIMONY OF KATHLEEN DANIELS,
FOR PLAINTIFF.

KATHLEEN DANIELS, called for the plaintiff,
sworn.

Mr. ERSKINE.—Q. What was your occupation in 1922?

A. Stenographer.

Q. Who were you employed by?

A. From August until the end of November I was employed by the Progressive Evaporator Company.

Q. Were you present at certain conversations which took place on or about the 27th of October, between Mr. Lombard, on the one hand, and Mr. Rees and Mr. Hine on the other, and Mr. Neal?

A. Yes, sir.

Q. Did you take any notes of those conversations?

A. I did. [251]

Q. May I show you these notes? Are they the notes you took of the conversation? Have you ever seen these notes, Mr. Barry?

Mr. BARRY.—No, I have not.

The COURT.—Q. Are these the original notes?

A. Yes, sir.

Mr. BARRY.—This is the typewriting, your Honor.

(Testimony of Kathleen Daniels.)

Q. Where are the original notes?

A. Do you mean the shorthand notes?

Q. Yes.

A. I don't know where they are. I took this down in shorthand.

Mr. ERSKINE.—Q. You took it down in shorthand and transcribed it into typewriting?

A. Yes, sir.

Mr. BARRY.—I urge the objection that this is not the best evidence.

The COURT.—Q. Did you transcribe it correctly?

A. Yes, sir.

Q. To the best of your ability? A. Yes, sir.

The COURT.—The objection is overruled.

Mr. ERSKINE.—I would like to offer these in evidence.

Mr. BARRY.—I want to know what it is.

The COURT.—What is it for?

Mr. ERSKINE.—These are statements made by Mr. Lombard at the time that he was willing to eliminate himself as president of the company, and willing to give up the position of president if he could be assured that they would protect him against the cancellation of the license agreement, and the assurance was not forthcoming.

Mr. BARRY.—I object to that, your Honor.

The COURT.—Objection sustained.

Mr. ERSKINE.—Is there any objection to the foundation? [252]

Mr. BARRY.—The Court has sustained that objection, anyway.

Mr. ERSKINE.—The sole objection is to its relevancy, is it? May I offer them in evidence, your Honor?

Mr. BARRY.—I object to them on the ground that they are immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained.

Mr. ERSKINE.—Exception. In the event, your Honor, that they should become relevant subsequently in this trial, will it be necessary to recall the witness from her work?

Mr. BARRY.—Oh, no. The foundation will be regarded sufficient for the purpose.

The COURT.—Call the next witness.

Mr. ERSKINE.—I would like to have these marked for identification.

The COURT.—Very well, for identification.

(The document was here marked Plaintiff's Exhibit No. 13 for identification.)

Mr. ERSKINE.—We rest, with this one exception; a stipulation was to be made here showing what these devices were manufactured for, and showing what they were sold for; in order to make *prima facie* proof of damages, it will be necessary to have that.

The COURT.—Proceed for the defense.

Mr. BARRY.—At this time, and for the purpose of the record, I make a motion to dismiss the bill of complaint herein—

(Testimony of Charles Hine.)

The COURT.—In an equity case the Court hears it all. If you make that motion you stand on it.

Mr. BARRY.—Then I will go ahead and put in our evidence. I was afraid I would lose my right if I did not make the motion at this time. [253]

The COURT.—Not in an equity case.

TESTIMONY OF CHARLES HINE, FOR
DEFENDANTS (RECALLED.)

CHARLES HINE, recalled for defendants.

Mr. BARRY.—Q. Mr. Hine, you heard the testimony of Mr. Neal concerning conversations with you in which you stated to him something concerning this small book and the contents of it?

A. Yes, sir.

Q. Did you ever tell Mr. Neal at any time that you had ever accepted any notes from the Progressive Evaporator Company in payment of royalties?

A. I did not.

Q. Did you ever tell Mr. Neal at any time that any payments had been made on account of royalties by the Progressive Evaporator Company to the Rees Blowpipe Company? A. I did not.

Q. Did you ever at any time tell Mr. Neal that you had any doubt about the right of Rees and Hine to cancel the license agreement because of nonpayment of royalties? A. I did not.

Q. Did anybody else at any time—Mr. Rees or anyone else—say anything about the payment of royalties, that is, about royalties having been paid, in the presence of Mr. Neal and yourself?

(Testimony of Charles Hine.)

A. No, sir, I do not think so.

Q. Was anything ever said by Mr. Rees at any time in your presence about the Progressive Evaporator Company having paid any royalties?

A. No, sir.

Q. Did the Progressive Evaporator Company pay any royalties to Rees and Hine up to the present time? A. No, sir.

Mr. ERSKINE.—If your Honor please, I object to that on the ground that it has been asked and answered by this witness.

The COURT.—Yes, the objection is sustained.

Mr. BARRY.—Q. There is in evidence here an account of [254] the Progressive Evaporator Company with the Rees Blowpipe Manufacturing Company. Was this account kept under your supervision?

A. No, sir.

Q. Who was your chief bookkeeper in the office at that time? A. Mrs. Crookston.

Q. And she was the one who had charge of these books? A. Yes, sir.

Q. Did you give her the entries at times to be placed in the books? A. Yes, sir.

Q. And did you notice whether or not those entries were made by her as requested?

A. Yes, sir.

Q. Did the Rees Blowpipe Company at any time render to the Progressive Evaporator Company any account or statement different than was shown upon

(Testimony of Charles Hine.)

the books of the Rees Blowpipe Company in that account?

Mr. ERSKINE.—I object to that, your Honor, on the ground that the accounts speak for themselves, and the statements speak for themselves.

Mr. BARRY.—I am asking him whether any statements of account were ever rendered by the Rees Blowpipe Manufacturing Company—

The COURT.—You are asking him if they rendered accounts which were different from the books. That is the question you asked him.

Mr. BARRY.—Yes, your Honor.

The COURT.—Well, if they did those accounts would show for themselves.

Mr. BARRY.—There is only one statement or account for each month, your Honor. I am sort of negating the proposition.

The COURT.—If you want to show they were alike, they will [255] show for themselves. If you want to show they were different from the accounts rendered, that is another matter.

Mr. BARRY.—Q. Have you any statements or copies of accounts rendered by the Blowpipe Manufacturing Company to the Progressive Evaporator Company, other than the statements in evidence here?

A. No, sir.

Q. Do you recall any conversation between Mr. Powell and Mrs. Crookston in the early part of this matter, concerning the crediting of payments on specific items?

(Testimony of Charles Hine.)

Mr. ERSKINE.—I object to that, your Honor, upon the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—I do not see that that is material.

Mr. BARRY.—Only for the purpose of showing why statements were thereafter rendered showing that specific payments were applied to specific items, and not to royalties.

The COURT.—And there might have been many that he would not have heard about. The objection is sustained.

Mr. BARRY.—Q. Referring to conversations had with Mr. Ward and Mr. Neal, did you at any time prior to the cancellation of the license agreement have any conversation with Mr. Ward in which you told him that you would give him and Mr. Neal a license agreement?

A. No, sir.

Q. Did you have any conversations with Mr. Neal at or about the time that the license agreement was cancelled, about giving to Neal and Ward a license agreement?

A. Yes, there was quite a lot of it.

Q. Do you recall whether or not anything was said to Mr. Neal about not talking about that matter until you had actually cancelled the license agreement? A. Yes, sir.

Mr. ERSKINE.—Your Honor, that is leading and suggestive, and I object to it as immaterial, irrelevant, and incompetent, [256] and also as leading and suggestive.

(Testimony of Charles Hine.)

The COURT.—It is only tending to prove what you have already proved, and what you wanted to prove, that there was talk about the new license agreement before the old one was cancelled.

Mr. ERSKINE.—My objection is to the leading and suggestive way in which the question was put.

The COURT.—As long as it makes for your own contention, I do not see how you can object to it. The answer will stand.

Mr. BARRY.—Q. When did you start taking up with Ward and Neal together the matter of a new license agreement?

A. Sometime after the old one was cancelled.

Q. When this controversy started between yourself, and Neal, and Rees, upon the one side, and Lombard and others upon the other side, did you have any conversation with Neal at that time about cancelling the license agreement at all?

A. Not directly at that time, it was sometime after before we discussed it.

Q. Did you have any conversation with Lombard, or any of these persons, about it being at all necessary for you to exercise control over the Progressive Evaporator Company before you could cancel the license agreement?

A. No, I do not think so.

Q. Do you know anything about these notes that have been referred to in the testimony of Mr. Powell and others?

A. Yes, sir.

(Testimony of Charles Hine.)

Mr. ERSKINE.—That is objected to, your Honor, upon the ground that it is too general.

Mr. BARRY.—I just wanted to find out if he knows it.

The COURT.—It is merely preliminary.

Mr. BARRY.—Q. Were you present at the time that those notes were turned over to Mr. Rees?
[257]

Mr. ERSKINE.—Which ones?

Mr. BARRY.—The notes that are entered under the date of September 30?

A. I don't think I was.

Q. Were there at times notes taken by the Rees Blowpipe Company in payment, as distinguished from notes taken as security? A. Yes.

Mr. ERSKINE.—Just a moment. That is objected to, your Honor, upon the ground that it is calling for the conclusion of the witness. He can state what was said about it, but I do not think he has the right to draw his own conclusions.

The COURT.—It is a shorthand rendition of an ultimate fact. You can cross-examine him as to the details if you desire to, and if the details do not support the statement, you can point it out to the Court, and the Court will ignore it. The objection is overruled.

Mr. BARRY.—Q. What notes were received by the Rees Blowpipe Manufacturing Company as payment and actually applied toward the payment of the Progressive Evaporator Company's account?

(Testimony of Charles Hine.)

Mr. ERSKINE.—The same objection, your Honor.

The COURT.—Objection overruled.

Mr. ERSKINE.—Exception.

A. The Stiles note and the Wilbur note are two that come to my mind.

Mr. BARRY.—Q. Let me ask you about the Glendenning note. Do you remember that?

A. Yes.

Q. And about the Bates note in some \$12,000.

A. Yes.

Q. Do you know about a receipt given under date of October 9th concerning two notes?

A. No, I don't think I know about that.

Q. You know about those notes being received?

A. Yes. [258]

Q. But those notes were received as payment, and not as security. Is that correct? A. Yes.

Q. And that was after all these other note transactions? A. Yes, sir.

Q. Are there any notes that are unpaid to-day?

A. Yes.

Q. What notes are still unpaid?

A. The two Turner notes.

Q. What do they amount to?

A. Something like \$2,600, roughly speaking.

Q. Were there any notes paid very recently? Do you recall the Bates note?

A. No, that is not paid—I beg your pardon, are you asking me about the notes held by me as secretary of the Progressive Company?

(Testimony of Charles Hine.)

Q. Yes.

A. There are the Turner notes and the Bates yet to be paid.

Q. Are there some notes held by the Rees Blowpipe Company as security at this time? A. Yes.

Q. That balance appears to be something like \$1,300 without any royalties being taken into consideration. Is that right? A. Yes, sir.

Q. What notes do you now hold as security for payments due to the Rees Blowpipe Company?

A. The Turner note.

Q. I show you a list of notes as of December 31, 1923, the same list which counsel referred to in evidence here. I notice here that on November 1, 1922, there was a note from Bates in the sum of \$6,500, which was due on November 1, 1922. Is that correct? A. Yes, sir.

Q. There were three notes from Paul M. Davis, all dated August 29, 1922, one in the sum of \$200, another in the sum of \$185, and another in the sum of \$300, all of which were due prior to October, 1922. Is that correct? A. Yes, sir.

Q. I show you two other notes of Turner which became due on [259] December 1, 1923, and December 1, 1924; have those notes been paid yet?

A. No, sir.

Q. Does there appear to be any prospect or reasonable prospect of collecting the Turner note?

A. No, sir.

Mr. ERSKINE.—That is objected to as im-

(Testimony of Charles Hine.)

material, irrelevant, and incompetent, and not any issue in this case.

The COURT.—Those were the notes that were in their possession in 1922?

Mr. ERSKINE.—In the possession of the Progressive Evaporator Company, your Honor.

The COURT.—Objection overruled.

Mr. BARRY.—Q. These are some of the notes that were turned over to the Rees Blowpipe Manufacturing Company as security?

A. The Turner notes.

Q. And those note aggregate \$3,900?

A. Yes, sir.

Q. And they are not even yet paid, are they?

A. No, sir.

Q. Counsel referred to a total of \$14,485 in notes as of December 31, 1923; several of those notes were already past due, were they not, in December, 1922? A. They were.

Q. What assets has the Progressive Evaporator Company at this time?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Are the assets of the Progressive Evaporator Company at this time, if fully realized upon, including the Turner notes, sufficient to pay the outstanding obligations of the company, without reference to royalties at all?

Mr. ERSKINE.—That is objected to on the same ground.

(Testimony of Charles Hine.)

The COURT.—What is the object of this?

Mr. BARRY.—I want to show, your Honor, just what the [260] financial situation was during all these years.

The COURT.—It is not so much what it is now, as it was when you took it over. *Object* sustained.

Mr. BARRY.—Q. Did you know that the Rees Blowpipe Company had entered any notes in its books as paid to you, on account of the indebtedness of the Rees Blowpipe Company, or rather, I mean on account of the indebtedness of the Progressive Evaporator Company to the Rees Blowpipe Company?

A. I did not.

Q. When you rendered, or caused to be rendered, the statements of October 6th and October 26th, showing balances due from the Progressive Evaporator Company to the Rees Blowpipe Company, did you know at those times that any notes had been credited up under date of September 30th to the Progressive Evaporator Company account, that is, on its books? I will withdraw that question and put it in another form. Had any notes ever been credited to the Progressive Evaporator Company account with the Rees Blowpipe Company other than as those notes became due and were collected? A. No, sir.

Mr. ERSKINE.—That is objected to on the ground that those accounts speak for themselves.

Mr. BARRY.—It is just summarizing it.

(Testimony of Charles Hine.)

The COURT.—Does it appear in these statements?

Mr. BARRY.—Yes, your Honor.

The COURT.—He can answer it, although it is not very material.

Mr. BARRY.—Q. I show you the statement of October 6th, 1922: Were you familiar with the contents of that statement at the time that it was rendered?

A. Yes, sir.

Q. There is appearing in this statement a reference to a balance of \$21,212.01 due from the Progressive Evaporator Company to [261] the Rees Blowpipe Company; was there any complaint made to you by Lombard, Powell, or anyone else, about this statement being incorrect? A. No, sir.

Q. Was there any complaint made by anybody connected with the Progressive Evaporator Company to anyone in your presence about this statement being incorrect? A. No, sir.

Q. I show you a statement dated October 26th, 1922, showing a balance due of \$23,918.79, without including any royalties, whatever, and I will ask you whether Lombard, Powell, or anyone else objected to you about that statement being incorrect, or not reflecting the books?

Mr. ERSKINE.—That is objected to on the ground that the witness has already testified he does not recollect whether that statement was ever left with Lombard and Powell. That was after the row occurred on October 26th.

(Testimony of Charles Hine.)

Mr. BARRY.—I have Mr. Lombard's own testimony to the effect that he had this statement.

The COURT.—Objection overruled.

A. No.

Mr. BARRY.—Q. These are the original statements, are they not?

A. As far as I know.

Q. Do you recall these statements being produced in Judge Murasky's court? A. Yes, sir.

Q. Who produced them? A. Mr. Erskine.

Q. Representing Mr. Lombard? A. Yes, sir.

Q. You had in your possession at that time copies of all these statements. Is that correct?

A. Yes, sir.

Q. Was there, any time after October 26th, 1922, and from that date thereafter, any objection made by Lombard, or anyone else to what this statement showed? A. No.

Q. Did Lombard, or anyone else, get in touch with you about [262] \$23,918 being an incorrect balance due from the Progressive Evaporator Company to the Rees Blowpipe Company? A. No.

Q. Up to the time that this royalty agreement was cancelled, was there ever anything said by Lombard, or anyone else, objecting to any statement at any time forwarded by the Rees Blowpipe Company to the Progressive Evaporator Company?

A. No.

Q. Do you recall, Mr. Hine, whether any of the notes which were credited up to the Rees Blowpipe Company were actually sold by the Progres-

(Testimony of Charles Hine.)

sive Evaporator Company to Rees, or somebody at Rees' instance? A. Yes, sir.

Q. Do you recall anything about a note in the sum of \$1,500? A. Yes, sir.

Q. What note was that?

A. A Stiles note—no, that is wrong.

Q. Whose note was it?

A. The money went to Stiles. The note was cashed.

Q. Can you, by reference to the statement, tell us which note it was?

Mr. ERSKINE.—What statement is that?

Mr. BARRY.—The statement of September 8, 1922.

A. It was either a Hind Estate note, or the Glendenning note.

Q. Which was it? A. The Hind note.

Q. Do you know what date that was? A. No.

Q. That note is on this list? A. Yes.

Q. And it is on the list of notes that were credited up as having been paid to the Rees Blowpipe Company. Is that correct? A. Yes.

Q. Tell the Court what transaction, if any, took place with reference to that note?

A. After the notes had been passed over to Mr. Rees, Mr. Lombard, who was in charge of the office, had to meet a certain obligation on the Stiles plant that was [263] being erected. He asked Mr. Rees to take and discount one of the notes for him. Mr. Rees gave him the money on the note.

(Testimony of Charles Hine.)

Q. Do you know how much he gave him on the note, discounting that note?

A. He gave him \$1,425 for a \$1,500 note.

Q. Did that transaction take place after the batch of notes had been delivered over to Mr. Rees from the Progressive Evaporator Company?

A. Yes, sir.

Q. That note appears upon the books of the Progressive Evaporator Company as having actually been received by the Rees Company as payment. Is not that correct? A. Yes, sir.

Q. And you say it was discounted at that time?

A. Yes, sir.

Q. Do you know about what time it was that that note was discounted?

A. No, I could not give you the date.

Q. Who is Mr. Glendenning?

A. There are two Glendennings.

Q. I mean Mr. Glendenning, the accountant.

A. An accountant employed by the Bullock & Kellog Company.

Q. You had him to go over these books at one time, did you? A. Yes, sir.

Q. What was your purpose in having an accountant go over the books?

A. I was forced to make a report to the Government for the corporation, and I could only do so by having Mr. Glendenning, who had previously worked on the books, come there and put them in order.

Q. You say Mr. Glendenning had previously

(Testimony of Charles Hine.)

worked on the books of the Progressive Evaporator Company? A. Yes, sir.

Q. I direct your attention to two notes, the note of Mr. Glendenning dated July 20, 1922, in the sum of \$400, and another note of Bates due November 1, 1922, in the sum of \$2,000; were these two notes received by the Rees Company as payment?

A. Yes, I think so.

Q. I show you a receipt executed by Mr. Rees, showing that [264] these notes were received on account. Is that correct? A. Yes, sir.

Q. Was that your understanding of the transaction at that time? A. Yes, sir.

Q. That was after all that batch of notes had been delivered over. Is not that correct?

A. I think so.

Q. Now, directing your attention to the checks which are in evidence here, and marked Defendants' Exhibit "D," you recall, do you, the Rees Blowpipe Company receiving the money represented by those checks? A. Yes, sir.

Q. Were those moneys received from those checks applied to the account of the Progressive Evaporator Company? A. Yes, sir.

Q. What account? A. The material account.

Q. Now, I show you statements in evidence here, just referring to them generally. Do these statements rendered to the Progressive Evaporator Company show the manner in which these checks were applied? A. Every one of them.

(Testimony of Charles Hine.)

Q. Were any of those checks, or any other moneys, ever received from the Progressive Evaporator Company credited to a royalty account?

A. No, sir.

Q. Some reference has been made here to this small book; you referred in your testimony this morning to a conversation with Lombard at one time concerning the taking over of certain notes as payment on royalties if the worse came to the worst. Do you recall that testimony?

A. Yes, sir.

Q. Just what conversation did you have with Lombard at that time, and I wish you would give us the whole of that conversation.

A. Mr. Rees and I were there trying to get some money on our account, and Mr. Lombard was unable to raise any money on the notes, and we were discussing that phase of it when I made that suggestion with reference to the royalty account.
[265]

Q. What did you say?

A. That if the worse came to the worst in the proposition, and he could not finance the company as he was supposed to do, we would take some of those long-term notes and apply them on the royalty account to help him out.

Mr. ERSKINE.—We move to strike out the words “as he was supposed to do.”

The COURT.—Motion denied.

Mr. BARRY.—Q. Was anything said by Lom-

(Testimony of Charles Hine.)

bard to you as to whether or not you could have the notes in that way?

A. At no time.

Q. Was there ever any agreement or arrangement with Lombard, or with anybody representing the Progressive Evaporator Company, that those notes should be applied toward payment of the royalty account? A. There never was.

Mr. ERSKINE.—That is objected to, your Honor, as calling for the conclusion of the witness and on the ground that he has told all the facts.

The COURT.—Objection sustained.

Mr. BARRY.—Q. At the time those notes were spoken of, were those notes already in the possession of Mr. Rees?

A. Yes, sir.

Q. That is to say, in the Rees Blowpipe Company?

A. Yes, sir.

Q. Why was the Rees Blowpipe Company holding them at that time? A. To secure our account.

Mr. BARRY.—I think that is all at this time.

Cross-examination.

Mr. ERSKINE.—Q. Now, Mr. Hine, coming again to the question of your being willing to take long-term notes on account of this royalty account, I understood you to say this morning that it was in pursuance of that statement that these [266] entries were made in this little book.

A. If my memory serves me right I did not admit ever having seen the book.

(Testimony of Charles Hine.)

Q. I think you did, I think you said you saw the book, but that is all, that it had been shown to you.

A. Since the controversy I saw the book, but I never saw it at the time the entries were in it, or knew anything of it.

Q. Didn't you make the statement this morning when I first asked you about that book, that those entries were made in that book in pursuance of the agreement or arrangement with Mr. Lombard about taking long-term notes? A. No.

Q. Are you sure of that?

A. I don't think I did, I do not see why I should have.

Mr. BARRY.—He said he knew nothing about it.
The COURT.—Proceed.

Mr. ERSKINE.—Q. Let me bring your attention, again, to these \$14,000 in notes which appeared on hand on December 31, 1923. Didn't you make the statement this morning, under my cross-examination, that those \$14,000 in notes were exclusive of the notes which the Rees Blowpipe Company held?

Q. Yes, that is true, those were held by me.

Q. Those were held by you as secretary of the Progressive Evaporator Company?

A. Yes, that is true. Let me explain something to you. There are two Turner notes held by me and two held by the Rees Blowpipe Company.

Q. The Turner notes and the \$14,000 worth of notes here in this list were not held by the Rees Blowpipe Company, were they? A. No.

(Testimony of Charles Hine.)

Q. And at the time when this list was made up, there was only due to the Rees Blowpipe Company on open account, \$2,500, was there not, or thereabouts, while at the same time and for practically [267] a year the other notes—the \$14,000 notes—had been held by the Progressive Evaporator Company.

A. The Rees Blowpipe Company did not consider it so.

Q. You are familiar with this account, are you?

A. Yes, sir.

Q. It shows that the Rees Blowpipe Company, on December 31 was due \$14,000.

A. December 31, 1923; that was a year after I took it over.

Q. And at the same time they had \$14,000.

A. I beg your pardon, because these had been turned over to St. Marie, and that had been all kinds of transactions then.

Q. This is a correct statement of the books of the company at that time, is it not? A. Yes, sir.

Q. And there purport to be outstanding at that time the \$14,000 worth of notes. Now, you spoke about the discounting of notes, and about going to the Crocker Bank, and about making an effort, from the time that this row started, and you became secretary—about making an effort to discount these notes. You said you did not make any effort, because Lombard had tried, prior to that time, to discount them, and that—

A. He and Mr. Rees, both.

(Testimony of Charles Hine.)

Q. Do you know where he tried to discount them?

A. No, not Mr. Lombard.

Q. The only place that you know of where there was an attempt to discount them was at the Crocker Bank? A. When we had them, yes.

Q. There was no attempt to raise money on them in any other way to meet these obligations?

A. No.

Q. As a matter of fact, when you dealt with Mr. Lombard and Mr. Powell, and the directors of the Progressive Evaporator Company, about your account, you discussed, generally speaking, both accounts together, did you not? A. Yes, sir. [268]

Q. You dealt with them both as the Rees Blowpipe Company and the royalty owners?

A. Yes, sir.

Q. At that time you did not make any distinction between the two of you. You rendered accounts on the same paper, and all that sort of thing, didn't you?

Mr. BARRY.—Just a moment. The accounts speak for themselves, and they do show a big distinction.

Mr. ERSKINE.—They are on the same paper.

Mr. BARRY.—They speak for themselves.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Did you testify this way before Judge Murasky:

“As I tried to explain, I think you will agree that Rees and Hine are practically the Rees Blow-

(Testimony of Charles Hine.)

pipe Manufacturing Company. If we went up there with a statement to check over, about a statement or money coming to us, we did not talk to one but to both.

“Q. You drew it all at one time?

“A. Yes, we drew it all at one time.”

A. No, not just as it is written there.

Q. But you recollect stating that you dealt as if this was all your one entire and individual matter?

A. Well, it was discussed there.

Q. Do you know how those pages in that book were torn out?

A. Mr. Erskine, I said here this morning under my oath that I never knew that book existed until after this controversy started.

Q. Then you did not show it to Mr. Neal?

A. I did not.

Q. Then you don't know how Mr. Neal came to know about the existence of that book?

A. I can readily understand it, yes, he had access to our office. [269]

Mr. BARRY.—Q. Who had access to your office?

A. Mr. Neal.

Mr. ERSKINE.—Q. Were you ever shown the pages in the book which have now disappeared?

A. No, sir.

Q. You were never shown them?

A. No, sir, I am sure of it.

Mr. BARRY.—Have you ever seen those pages, Mr. Erskine?

Mr. ERSKINE.—No, I never heard about it.

(Testimony of Charles Hine.)

The COURT.—Just a moment. Proceed with the witness. Anything further on cross-examination?

Mr. ERSKINE.—Q. Did you ever discuss with Mr. Lombard or Mr. Powell at any time, or with Mr. Neal, either, about making out a check for these royalties to you and Hine individually, for those royalties?

A. Yes, we demanded payment on the royalties any number of times.

Q. When was that?

A. At the time we were discussing the accounts.

Q. Was that at the same time you would be willing to wait on the royalties and take long-term notes?

A. Previous to that time, because there had been a complete failure all the time to get it and satisfy them.

Q. So previous to that time you had demanded the royalties?

A. Yes. We did not use the word "demand," because we were friendly. It was so much on royalties, and so much on the Rees Blowpipe account, when are we going to get the money?

Q. And they would give you cash and give you notes? A. Yes, sir.

Q. And after that when they said they could not pay you said you would be willing to take long-term notes on the royalties?

A. Yes; that was after lots of discussion about it.

(Testimony of Charles Hine.)

Q. That was after lots of discussion about it?

A. Yes. [270]

Q. Now, I want to call your attention to one other thing. You say that this Stiles note was discounted.

A. No, I beg your pardon—oh, yes, it was discounted by the Rees Blowpipe. I think so.

Q. But in this statement that was rendered on the 4th of September, let me call your attention to the fact that while the Stiles notes were delivered, you gave credit for \$6,900 in payment; are those the same Stiles notes?

A. I don't remember just now of saying that the Stiles notes were discounted; I don't remember saying that.

Q. I think you said that.

A. I said the note that Mr. Lombard asked Mr. Rees to cash was a note which they wanted to raise money on.

Q. Which note was it they took?

A. The note of the Hind Estate.

Q. The note of the Hind Estate?

A. Yes, for \$1,500.

Q. That came in in October, did it not, in the last batch of notes?

A. I could not say.

Q. There was a big batch of notes.

A. It was one of those that Mr. Rees had taken and then gave back to Mr. Lombard.

Q. It is not referred to in this statement of October 6th.

(Testimony of Charles Hine.)

A. It was in that other list, in that big batch.

Q. And the subsequent statements of October 6th and September 30th were rendered at or about the time this row was pending? A. Yes.

Q. And when everything was disorganized.

A. That last one was, I think.

Q. You are not sure whether Lombard or Powell ever had that statement, or, rather, kept it?

A. I could not swear that they kept it. It was there at that meeting when we were trying to have Mr. Lombard let us have a meeting.

Q. I mean the one of December 30th?

A. No, I cannot say [271] that they ever got that.

Q. As a matter of fact, Mr. Powell was not present on October 27 when you were trying to fix up about that meeting; the secretary was not present, was he?

A. No, he was not present, as I remember it.

Q. After you cancelled the license agreement, Mr. Hine, why were you so anxious to keep control of the corporation? A. After we cancelled it?

Q. Yes, you cancelled the license agreement on January 12, 1923.

A. I never knew that we were anxious to have control of it; I never knew it.

Q. You insisted on your rights, and went through with a petition for a writ of mandate.

Mr. BARRY.—That was before January.

Mr. ERSKINE.—No, it was after January.

(Testimony of Charles Hine.)

Mr. BARRY.—The writ of mandate was issued December 22d, and the writ was issued permanently after it became final.

Mr. ERSKINE.—The hearings in Judge Murasky's court continued until after the cancellation of the license.

The COURT.—Proceed with your proof. I cannot listen to what lawyers disagree on.

Mr. ERSKINE.—Q. You remember testifying in Judge Murasky's court as follows, do you not:

“I suppose you three got together and said if things did not turn out right you would cancel the agreement.

“A. Yes.

“Q. And start all over. A. Yes.”

Q. You remember giving that testimony, do you not? A. Yes, sir.

Q. You had engaged in this litigation and went right through [272] it, and continued to retain the control of the company even after the cancellation of the agreement?

A. We had no other way to defend ourselves.

Q. Defend yourselves against what?

A. Against Lombard.

Q. Against what?

A. For what he had not done.

Q. In other words, you considered that it was imperative for you to retain the control of this company to defend yourself against Lombard?

A. Yes, sir.

(Testimony of Charles Hine.)

Q. So that he would not be able to work the territory and keep up the business of the company under this license?

A. So he could not function and get our material and not pay for it.

Mr. BARRY.—Q. Lombard made some pretty glowing promises when he became connected with the Progressive Evaporator Company, did he not?

Mr. ERSKINE.—That is objected to as immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Under date of October 10th there is a credit to the Progressive Evaporator Company as follows: "Cash from Bull & Sherman \$1,000." Were certain notes from Bull & Sherman held by the Progressive Evaporator Company as security at that time, at the time that that \$1,000 was paid?

A. Held by the Progressive Evaporator Company?

Q. No, I mean held by the Rees Blowpipe Company. A. I think so.

Q. As a matter of fact, the Bull & Sherman notes are referred to in that list which was entered in the books of the Progressive Evaporator Company on September 30th. Is that correct?

A. I think so.

Q. At that time was anything said about that credit being incorrect, and that the Bull & Sherman notes had been credited [273] up a long time prior to that date. A. No.

(Testimony of Charles Hine.)

Q. Was that procedure followed with all other notes as they were paid? A. Yes, sir.

Q. You credited them up to the Progressive Evaporator Company? A. Yes, sir.

Q. And even to-day, with all of those credited up, you say there is still \$1,300—

The COURT.—Now, just a moment. You have gone over that repeatedly. Vacate the stand. You are through with this witness, both of you. This case will now have to stand over until next Monday afternoon at two o'clock.

(The further hearing of the cause was thereupon continued until Monday, July 26, 1926, at two o'clock, P. M.) [274]

(Title of Court and Cause.)

Before: Hon. GEORGE M. BOURQUIN, Judge.
(REPORTER'S TRANSCRIPT.)

Monday, July 26, 1926.

Counsel Appearing:

For Plaintiff: Messrs. KEYES & ERSKINE,
H. W. ERSKINE, Esq.

For Defendants: Messrs. SULLIVAN, SULLIVAN & THEODORE ROCHE, EDWARD I. BARRY, Esq.

Mr. BARRY.—There was the matter of an agreement, if your Honor please, signed by Mr. Neal, that was referred to in the evidence, and I

(Testimony of Charles Hine.)

would like permission to recall Mr. Hine to ask him about that.

The COURT.—Very well.

CHARLES F. HINE, recalled for defendants.

Mr. BARRY.—Q. Mr. Hine, I show you what purports to be a letter dated May 12, 1924, and addressed to Claude Rees and Charles F. Hine, and I will ask you if you ever saw that letter before.

A. Yes, sir. [275]

Mr. BARRY.—Mr. Erskine, this is the letter you asked us to produce as signed by Mr. Neal at the time that the Cornell agreement was entered into.

The COURT.—But what is the object of it? Are you just showing it to him, or are you going to offer it in evidence?

Mr. BARRY.—I am going to offer it, but I wanted to show it to counsel first, your Honor.

Mr. ERSKINE.—I have not had an opportunity to examine it, your Honor.

The COURT.—Well, be brief with it. These documents were all available before the trial in one way or another. Are you offering this document in evidence?

Mr. BARRY.—Yes, your Honor.

Mr. ERSKINE.—I object to it upon the ground it is immaterial, irrelevant, and incompetent.

The COURT.—It will be received over the objection; if not competent or material the Court will ignore it in making up its decision.

Mr. ERSKINE.—Exception.

(Testimony of Charles Hine.)

Mr. BARRY.—Q. And there is an assignment dated May 12, 1924, from Mr. Neal. Do you recall receiving both of these documents from Mr. Neal?

A. Yes, sir.

Mr. BARRY.—I offer these documents in evidence, and ask that they be marked defendants' exhibit next in order. This is the document in which Mr. Neal gives protection to Mr. Rees and Mr. Hine in connection with the Cornell agreement. This is the paragraph I want to call your Honor's attention to:

“This document is executed upon the understanding that said Progressive Evaporator Company has assets other than said license agreement, which license agreement both you and I believe [276] has been legally cancelled.”

The COURT.—What object is this supposed to serve?

Mr. BARRY.—I connection with the testimony of Mr. Neal counsel demanded that this letter be produced, and I produce it now.

The COURT.—Very well. The Court will ignore it if it is not competent or material. Proceed briefly with this case. I want to bring it to a conclusion.

(The document was here marked Defendants' Exhibit “G.”)

Mr. BARRY.—Q. You were asked by Mr. Erskine whether there was any meeting of the Board of Directors of the Progressive Evaporator Com-

(Testimony of Charles Hine.)

pany after that held on January 13, 1923; was there any meeting held after that date?

A. Yes, sir.

Q. I show you a draft of minutes of what purports to be a meeting of the Board of Directors of that company on February 23, 1924, and I will ask you if those minutes were prepared by you at or about that time? A. Yes, sir.

Q. Do you recall notice of that meeting being served upon Mr. Lombard?

A. It was mailed to him.

Q. Did you have any conversation with Mr. Lombard at that time about meetings of the company? A. Directly after that time.

Q. What conversation did you have with him?

A. I met him in Mr. Erskine's office and asked him why he did not come to meetings and he said he did not care to join us in any of the meetings.

Mr. BARRY.—I offer these minutes in evidence.

Mr. ERSKINE.—I object to them as immaterial, irrelevant, and incompetent, and on the ground that this occurred a year after the license was cancelled.

The COURT.—I doubt if they have any materiality or competency, but for the purpose of the record they will be admitted. If the case goes up they will be there for the benefit of [277] the Circuit Court of Appeals.

Mr. ERSKINE.—We note an exception.

The documents were marked Defendants' Exhibit "H.")

(Testimony of Charles Hine.)

Mr. BARRY.—Q. You were questioned by Mr. Erskine about certain notes which came into your possession as secretary of the Progressive Evaporator Company; what time was it that you received these notes?

A. February 8, 1923, when we took possession.

Q. That was after the writ of mandate was issued by the District Court of Appeal? A. Yes, sir.

Q. I show you what purports to be a list of notes receivable as of December 31, 1922, of the Progressive Evaporator Company, and ask you if that is a correct list of the notes which came into your possession in February, 1923? A. Yes, sir.

Q. You saw another list presented to you here containing notes aggregating \$14,000, instead of \$12,185? A. Yes, sir.

Q. Were there some notes received by you during that year, that is, between December 31, 1922, and December 31, 1923? A. Yes, sir.

Q. From whom? A. From Turner.

Mr. BARRY.—I offer this schedule of notes receivable in evidence and ask that it be marked defendants' exhibit next in order.

(The document was here marked Defendants' Exhibit "I.")

Q. On this list are three notes of Paul M. Davis. Have those notes ever been collected? A. No, sir.

Mr. ERSKINE.—That is objected to as immaterial, irrelevant and immaterial, and on the ground that it is not within the issues in this case.

(Testimony of Charles Hine.)

Mr. BARRY.—I want to show that they are absolutely uncollectible notes. [278]

Mr. ERSKINE.—It is not a question now whether they are uncollectible, but whether money could have been raised on them at the time that this license was cancelled.

The COURT.—The answer will stand.

Mr. BARRY.—Q. Why have they not been collected?

Mr. ERSKINE.—We make the same objection to that, your Honor, on the same grounds.

The COURT.—Objection overruled. Answer the question.

Mr. ERSKINE.—Exception.

A. We have endeavored to collect them, and found that the man had nothing.

Mr. BARRY.—Q. When did you make the first endeavor to collect them?

A. In the year 1923.

Q. After these notes came into your possession?

A. Yes, sir.

Q. I direct your attention to two notes of Thorn Bros., each in the sum of \$2,500; did you ever make any attempt to collect those notes?

Mr. ERSKINE.—We make the same objection to that, your Honor, upon the same grounds.

The COURT.—The objection overruled.

Mr. ERSKINE.—Exception.

A. Yes.

Mr. BARRY.—Q. What did you find?

(Testimony of Charles Hine.)

A. That the Diamond Match Company had the notes attached in the first place, and—

Q. Those two notes?

A. Yes, they attached them at that same time.

Q. And what done with those notes?

A. The first one was used to pay the Diamond Match Company, and the second one was used to pay St. Marie, who was an agent in the field.

Q. Directing your attention to the Bates note, \$6,500, has that note ever been collected?

A. Not entirely. [279]

Q. What part has been collected?

A. About \$2,500.

Q. Have you attempted to collect the balance of it? A. Yes, sir.

Mr. ERSKINE.—Just a minute. I object to that, may it please your Honor, upon the ground that it is immaterial, irrelevant, and incompetent; it has no reference to the time when the license was cancelled, and occurred sometime later, when the situation might have been entirely changed.

The COURT.—Well, he is taking his chance on that. If the situation appears to be different, it might have a different effect. The objection is overruled.

Mr. ERSKINE.—Exception.

Mr. BARRY.—Q. I call your attention to the fact that this note appears to be due January 1, 1923. This note was due at the time it was received by you, was it not?

A. Yes, sir.

(Testimony of Charles Hine.)

Q. Did you attempt to collect that note as soon as it came into your hands? A. Yes, sir.

Q. What was the result?

A. The result was that the man could not pay it at that time, and we extended him some time, and then he made certain payments, and some new notes, which I now hold.

Q. Have you any guarantee that you got from him and his wife in that connection? A. Yes.

Q. Now, that accounts for all these notes in this statement, does it not? A. Yes, sir.

Mr. BARRY.—That is all.

The COURT.—Cross-examine.

Cross-examination.

Mr. ERSKINE.—Q. In January, when you cancelled the license, you knew of the existence of these notes, did you not?

A. Not directly, Mr. Erskine, no. [280]

Q. You knew that sales had been made to these various persons, did you not?

A. Yes, but I was not in direct touch with what they held in the office.

Q. You were aware that they had taken contracts and notes from purchasers to whom they sold the machinery that had been manufactured by you, were you not? A. Yes, sir.

Q. In fact, your books showed the persons to whom this machinery had been sold, did they not?

A. Yes, sir.

Q. And if a machine was delivered to Turner,

(Testimony of Charles Hine.)

or to Davis, or to Bates, or to Thorns, you knew about it, did you not? It showed on your book also, did it not? A. Yes, sir.

Q. Now, you made a statement reconciling a list of notes, the list which appears in a statement which has just been introduced by your counsel and which is marked "Special examination as of December 31, 1922," that these were all the notes that you secured at that time, the ones referred to amounting to \$12,185. A. Yes, sir.

Q. It is true, is it not, that you did subsequently secure the Turner notes?

A. The contract which I hold; it does not show in the note list.

Q. The Turner notes were of date July 20, 1922, were they not?

A. I don't remember the date; they will speak for themselves.

Q. I show you the list of notes receivable made up on December 31, 1923. A. Yes.

Q. Now, referring to the Bates Bros. notes: That was due on November 1, 1922, the entire note of \$6,500. A. I don't remember the dates clearly.

Q. Did you ever attempt to borrow money from November 1st until January—

Mr. BARRY.—Now, just a moment. I object to that question, may it please your Honor, upon the ground that the record shows [281] that during that period of time Mr. Rees, and Mr. Hines, and Mr. Neal were fighting in the Appellate Court to control this company and that they put them to

(Testimony of Charles Hine.)

this proceeding in the Appellate Court before they could do anything.

The COURT.—Objection overruled.

Mr. ERSKINE.—Q. Did you ever make any attempt, from November 1st, when you became the secretary of the Progressive Evaporator Company, to January 13, 1923, to borrow money on this list of notes referred to here, this \$14,000 odd?

Mr. BARRY.—The record shows that he did not then have possession of the notes. I make that as a further ground of objection.

The COURT.—Objection overruled. Answer the question.

A. I did not, Mr. Erskine, because I did not have the notes, and did not know what they were.

Mr. ERSKINE.—Q. You did not make the attempt? A. No, sir.

Q. Now, as a matter of fact, as I just pointed out in your statements, you knew that these plants had been turned over to Mr. Turner, and all the other persons named on that list? A. Yes.

Q. Your statement of October 6th contains the names. You knew, as a matter of fact, did you not, as a director of the company, the terms on which those plants had been delivered over?

A. Yes, sir.

Q. Then did you not know that the notes had been received from them, if you knew the terms upon which they had been delivered over?

A. I was not directly connected there, so that I

(Testimony of Charles Hine.)

would know what Mr. Lombard was doing with the notes.

Q. You were a director of the Progressive Evaporator Company, were you not? A. Yes, sir.

Q. And as a director you knew in a general way what he was [282] doing, did you not?

A. I knew he was trying to get money on them, but I did not know all the time what he had done with the notes.

Q. But you knew of the existence of the notes?

A. Yes, I did.

Q. And you knew what was in the bank account, did you not? A. No, I did not.

Q. Didn't you ever go over to the Crocker Bank after you were named secretary, and examine the records over there? A. I cannot say that I did.

Q. You knew, did you not, that there was a balance on hand in the Crocker Bank, and that it remained on hand, and increased after the 1st of November?

Mr. BARRY.—Now, I object to that question, if your Honor please, on the ground that the record is the best evidence of its contents. There was not \$100 in the Crocker Bank during that period of time.

Mr. ERSKINE.—Well, I will put the record in.

Q. You are the secretary of the company, are you not? A. Yes.

Q. And here is the record of the account of the company with the Crocker Bank, is it not?

A. I presume it is.

(Testimony of Charles Hine.)

The COURT.—Is it?

Mr. ERSKINE.—Q. Is this the record?

A. Yes, it is.

Q. This record purports to show that on October 30th there was a balance on hand of \$632.14; November 30, \$808.79; December 30, there were deposits of \$1,000 and withdrawals of \$500—that is the withdrawal for St. Marie, is it not?

A. I think so.

Q. Leaving a balance on hand of \$1,308.79. Then in February, the month after you cancelled the license, there were deposits of \$4,834.78 and withdrawals of \$2,882.96, leaving on hand at the end of February in the bank \$4,260.61. Is that a fact? [283]

Mr. BARRY.—Now, just a moment. I submit that the record is the best evidence, and, furthermore, it contains no explanation of the items at all.

The COURT.—Objection sustained.

Mr. ERSKINE.—I offer the record in evidence.

The COURT.—Admitted.

Mr. BARRY.—The only point about that would be, your Honor, that it is unintelligible without the deposit-slips and the checks.

The COURT.—Very well, you can keep that in mind.

Mr. BARRY.—Very well, your Honor.

(This book was previously marked Plaintiff's Exhibit No. 11.)

(Testimony of Charles Hine.)

Mr. ERSKINE.—Q. As I understand it, the Bates note for \$6,500, on that you got \$2,500 in cash, and you have taken renewal notes, and a guarantee by Bates' wife: Is that not a fact?

A. That is my best memory on it.

Q. Have the Turner notes been paid? A. No.

Q. But you have taken security for them, have you not? A. Yes.

Q. What is your security for the Turner notes?

A. There were no Turner notes delivered over to me; there was a contract for about \$2,500; we then got Mr. Turner to give us his promissory note to secure the contract, and then we took over some land.

Q. As security? A. Yes, sir.

Q. And you still hold this land, do you not?

A. Yes, sir.

Q. Who was the deed to that land made out to?

A. Mr. Rees, as trustee.

Q. Both for the Rees Blowpipe Company and the Progressive Evaporator Company?

A. For the Progressive Evaporator Company.

Q. Trustee for the Progressive Evaporator Company? A. Yes, sir.

Q. Referring to this question of notes, of course you have not [284] the notes here, have you?

A. I don't happen to have the Turner notes here, no, sir.

Q. What was the form of those notes? Were they simply unsecured promises to pay, or were they contracts for the purchase of these devices?

(Testimony of Charles Hine.)

A. These additional notes—that is, we hold the contract yet, and the notes that we took were his personal notes, besides the contract.

Q. I don't mean that. I mean the form of the notes referred to in the various lists that we have here.

Mr. BARRY.—Mr. Erskine, have you any of the notes? If you have a form we might agree on it.

Mr. ERSKINE.—I have never seen a note or the contract. I thought that perhaps we could shorten this up a bit if we could have a form of note.

Q. Was it a contract for the purchase of material, or was it a promissory note?

A. It was a promissory note.

Q. There were also contracts made?

A. Yes, as secretary, I hold the contract that was made out; also the notes, which are just promissory notes.

Q. With the contract that you got from Turner, you got that with the other papers, in February, 1923, did you not? A. Yes.

Q. Were the notes mentioned in the contract for the purchase of the material?

A. No, they were not.

Q. They were separate instruments—contracts from purchasers, or notes from purchasers.

A. Yes.

Q. What contracts did you have from the purchasers, besides the notes?

A. I cannot answer that directly. They are all

(Testimony of Charles Hine.)

set forth in that statement, but I cannot answer it directly.

Q. Let me call your attention to the Bullock & Kellogg statement here.

A. There is some mention of the Turner contract in there somewhere. [285]

Q. In addition to the \$14,885 of notes receivable which you had on December 31, 1923, you also had contracts receivable \$3,870.79. That was the year later. In December of 1922, which is the date of this statement, December 31, 1922, how many contracts did you have then?

Mr. BARRY.—I submit that if the witness has not an independent recollection the documents speak for themselves. First of all, may it please your Honor, there is no foundation laid that he knows.

The COURT.—Do you know?

A. I think they were just the same contracts. I made no other contracts; none of us did.

Mr. ERSKINE.—Q. Had any of them been turned into notes at that time?

A. No, I don't think so.

Q. In addition to the notes in this list, \$12,185, in addition to that there were contracts in existence amounting to close to \$4,000?

A. There were some contracts, I cannot tell you just what they were.

Q. Did you attempt to raise money on those contracts?

(Testimony of Charles Hine.)

A. They were not such that you could do that with them.

Mr. ERSKINE.—I move to strike out that answer, your Honor, as not responsive.

The COURT.—Motion granted.

Mr. ERSKINE.—Q. Did you, between November 1st, when you became the secretary of the company, and Neal and Rees directors make any attempt to borrow money on those contracts?

Q. I mean up to the time you canceled the license. A. No.

Q. With the exception of the meeting which you say was held in February, 1924, the minutes of which were just introduced, was there any meeting held after January 13, 1923, the day the three of you met together and Neal notified you that the license had been canceled? [286]

Mr. BARRY.—The minutes are the best evidence of what notice was given.

The COURT.—He can answer the question.

A. Will you give me the dates again, please?

Q. The date of this meeting which you say was held on the 23d of February, 1924. Now, between that date and January 13, which was the date that Neal notified you in the directors' meeting that the license had been cancelled by you and Mr. Hine, did you have any meetings of any kind, any directors' meetings?

A. My memory is not clear. I think there were some adjourned meetings after January 13th.

(Testimony of Charles Hine.)

Q. Where are the minutes of those adjourned meetings?

A. Mr. Barry would have them if there were any such.

Mr. ERSKINE.—You have none, have you, Mr. Barry?

Mr. BARRY.—I have not, and if there were any such the minutes were not prepared, so far as I know.

Mr. ERSKINE.—Q. You kept the minutes of the meetings, did you not, as secretary?

A. Yes.

Q. The proposed minutes which you have just had introduced in evidence were not pasted into the minute-book of the company, were they?

A. No.

Mr. BARRY.—And none of the minutes of the meetings preceding that were put in that book.

The COURT.—Never mind, Counsel, let him conduct his examination without interruption.

Mr. BARRY.—Pardon me, your Honor.

The COURT.—See that you refrain from these interruptions. Proceed with the case.

Mr. ERSKINE.—Q. The minutes up to January 13, 1923, were all signed by you, and Neal, and Hine?

The COURT.—Well, Counsel, they show for themselves if [287] they were.

Mr. ERSKINE.—Q. And they were read and approved at subsequent directors' meetings, were they not?

(Testimony of Charles Hine.)

A. Yes.

Q. But these purported minutes of the meeting of February 23, 1924, were never approved at any directors' meeting, were they?

Mr. BARRY.—I submit that the minutes are the best evidence of their contents.

The COURT.—No, not necessarily.

Mr. ERSKINE.—Q. Did you ever read off at a directors' meeting and have them approved, the purported minutes just introduced?

A. I think there were subsequent meetings, showing that we did approve certain things that happened. That was more than one meeting, as I remember it.

Q. These are adjourned meetings? A. Yes.

Q. Why were not these minutes signed by the president and the secretary of the company?

A. I cannot give you any reason why they were not.

Q. And Mr. Lombard was not present, was he, neither was Mr. Powell, at that meeting? A. No.

Q. You spoke about the Diamond Match Company. You said that the Diamond Match Company had one note under attachment. What did you mean by that?

A. The Company owed the Diamond Match Company some money, and they attached the Thorne note.

Q. They attached it in Thorne's hands?

A. Yes.

(Testimony of Charles Hine.)

Q. And then later on Thorne gave two notes, didn't he?

A. No. There were always two notes. One of them was coming due, and they knew it, and they attached that note.

Q. And later on he gave that note directly to the Diamond Match Company?

A. No. We had it released. We worked with them and got them to release it, and we got the money and put it in the bank, and then they attached the money in the bank afterwards, [288] and we had to pay them.

Q. You got them to release that attachment on that note, did you? A. Yes.

Q. When did you get them to release that attachment on that note? A. I cannot tell you.

Q. Was it before or after the cancellation of the license agreement? A. I think it was after.

Q. It was after the cancellation?

A. I think so.

Q. And the trouble with Normanson, and with St. Marie, those were all after the cancellation of the license agreement, too, were they not?

A. They all followed along, but I cannot give you the date.

Q. You know they were all after the cancellation, though, don't you? A. I think so, yes.

Redirect Examination.

Mr. BARRY.—Q. You referred to certain balances in the Crocker Bank: The dates were men-

(Testimony of Charles Hine.)

tioned by counsel. At the end of November, counsel referred to \$808.79 as being in the bank at that time. Do you recall any sum of \$300 that entered into that sum of \$808?

A. I think there was money for stock.

Q. For three shares of stock? A. Yes.

Q. And they disputed your right to have those issued? A. Yes, sir.

Q. There appears at the end of December \$1,308.99; you recall, do you not, that Mr. Lombard had 13 shares of stock issued to himself and members of his family? A. Yes, sir.

Q. And you and Mr. Rees and Mr. Neal caused 13 shares of stock to be issued to you. Is that not correct? A. Yes; sir.

Q. And that \$1,308.99, in fact, at the end of December represents \$1,300 for stock purchased in dispute, does it not? A. Yes, sir. [289]

Q. At the end of February counsel refers to \$4,260.61 as being in bank at that time. In the meantime did Mr. Lombard deposit \$1,300 representing shares of stock issued to him or by him?

A. Yes.

Q. So that the \$4,260.61 represents \$2,600 of stock money that was in dispute, and the subject of the litigation before Judge Murasky, does it not?

A. Yes, sir.

Q. As I understand it, you had 13 shares of stock issued, or, rather, attempted to have them issued to off-set the 13 shares of stock that Mr. Lombard had issued? A. Yes, sir.

(Testimony of Charles Hine.)

Q. So that the net amount would be \$1,400 in bank at the end of February, leaving out that stock money, would it not? A. Yes, sir.

Q. Do you recall that Mr. Lombard deposited some money in bank at or about the time he turned over the papers and records to you? A. Yes.

Q. Referring to the books of the Progressive Evaporator Company, the books show accounts of various debtors of that company, and the amounts due the company, do they not? A. Yes, sir.

Q. When did those books come into your possession? A. February 8.

Q. Did you know the amounts that were due from any of those parties until the books came into your possession? A. I did not.

The COURT.—Is that all? Call your next witness. Vacate the stand.

TESTIMONY OF MARY D. CROOKSTON, FOR DEFENDANTS.

MARY D. CROOKSTON, called for defendants, sworn.

Mr. BARRY.—Q. What is your name?

A. Mary D. Crookston.

Q. Where do you reside?

A. 2901 Buchanan Street. [290]

Q. Are you employed at the present time?

A. Yes, sir.

Q. By whom? A. By various people.

Q. In what line of business? A. Bookkeeping.

(Testimony of Mary D. Crookston.)

Q. By whom were you employed during the year 1922?

A. By the Rees Blowpipe Manufacturing Company.

Q. How long did you continue in their employ?

A. Until March, 1926.

Q. Do you know Mr. Powell, who was the secretary of the company, the Progressive Evaporator Company, during part of the year 1922?

A. Yes, sir.

Q. Do you recall rendering statements to the Progressive Evaporator Company during the year 1922, for the Rees Blowpipe Manufacturing Company? A. Yes, sir.

Q. Do you recall payments being made, that is, cash payments, by the Progressive Evaporator Company to the Rees Blowpipe Company?

A. Yes, sir.

Q. Did you have any conversation with Mr. Powell concerning the application of those cash payments? A. Yes, sir.

Q. When did you have the conversation with him?

A. About the time that the payments were received.

Q. And as each payment was received?

A. Yes, sir.

Q. Were the conversations that you had with him upon that subject of the same general nature?

A. Yes, sir.

(Testimony of Mary D. Crookston.)

Q. Just state what Mr. Powell said to you in connection with those particular matters.

Mr. ERSKINE.—If the Court please, we object to that as immaterial, irrelevant and incompetent.

Mr. BARRY.—Very well, I will withdraw the question and put it in another form.

Q. I direct your attention to a check dated June 27, 1922, in the sum of \$1,000; do you recall that check being received on or [291] about that date?

A. Yes, sir.

Q. Did you have any conversation with Mr. Powell at that time about that check?

A. Presumably; we talked about all of them.

Q. When did you talk about all of them to him?

A. Over the phone at various times as they were received.

Q. As they were received? A. Yes, sir.

Q. Now, let us go to this first time, June 27, 1922; will you state—

The COURT.—What is the object of this, Counsel?

Mr. BARRY.—It is only to show that Mr. Powell requested that payments be applied toward a specific item, and that this lady sent bills in accordance with that instruction at that time, and that each of those cash payments was applied toward specific items in the Rees Blowpipe Manufacturing Company's account.

The COURT.—Well, I think that is sufficiently shown, already, by the statements.

(Testimony of Mary D. Crookston.)

Mr. BARRY.—Very well, your Honor, the statements are here.

Q. I notice here that the various statements purporting to have been rendered by the Rees Blowpipe Manufacturing Company to the Progressive Evaporator Company show that certain moneys paid were applied toward specific items; at whose request, if it was at the request of anyone, did you make an application of payments in that manner?

A. Mr. Powell.

Q. Did you keep all of the books of the Rees Blowpipe Manufacturing Company? A. Yes, sir.

Q. Do you recall any book in which a memorandum of royalties was kept during the year 1922?

A. There was a book; it was not a book of the Rees Blowpipe Manufacturing Company, though.

Q. At any rate, there was a book?

A. Yes, sir. [292]

Q. Who kept that book? A. I did.

Q. I show you a book, more as regards the form of it than anything else, and I will ask you if this is the book in which those records were kept by you during the year 1922? A. Yes, sir.

Q. You notice that in this book there are certain pages preceding page 9 that are excluded from this book; who was it that took those pages out of that book? A. I did.

Q. Do you recall the time or about the time when those pages were taken by you out of the book?

A. No, I don't remember when it happened. It was when I ceased to need them any more.

(Testimony of Mary D. Crookston.)

Q. How did you come to take them out of the book?

A. Because it was only a memorandum, and when I felt that I had no further use for the memorandum I destroyed it.

Q. You mean that you removed those pages from the book? A. Yes, sir.

Q. I show you an account here of the Progressive Dehydrator Company, beginning on page 10. Do you recall the time when this royalty account was opened? A. Yes, sir.

Q. Can you tell when it was that those pages were torn out, with reference to the time that this account was opened—I mean the Progressive Dehydrator account?

A. Only that it was previous to that, because I destroyed those records, as I had use of the book for others.

Q. Had you used the book for other purposes besides the royalty matter? A. Yes.

Q. Can you tell us the contents of those pages in the book?

A. Other than that it was a record of the bills that were rendered by me for Mr. Rees and Mr. Hine for royalties.

Q. Can you state it any more definitely than that?
A. It was a record of the bills for royalties rendered by me for Mr. Rees [293] and Mr. Hine to the Progressive Evaporator Company.

Q. Do you recall any memorandum in this book

(Testimony of Mary D. Crookston.)

with reference to some notes of the Progressive Evaporator Company?

A. I don't remember that. That might have been there, but I don't remember that of my own recollection.

Q. At the time you destroyed those or took those pages out of the book, did you believe that they had any pertinency to any pending litigation or any controversy?

A. I did not. They were my own personal memorandum.

Mr. BARRY.—That is all.

The COURT.—Cross-examine.

Cross-examination.

Mr. ERSKINE.—Q. When did you leave the employ of the Rees Blowpipe Manufacturing Company? A. March 1, 1926.

Q. That was after the commencement of this suit?

A. That was just in March of this year.

Q. And, as I understand you, you state that you tore out the pages of the memorandum book after you finished with the memorandum you had in it. Is that the fact? A. Yes.

Q. Did you tear them out during the progress of the trial in the state court?

A. I don't know the dates of that trial.

Q. When did you finish with the Progressive Dehydrator Company business?

A. That was in 1924.

(Testimony of Mary D. Crookston.)

Q. That was in 1924? A. Yes, sir.

Q. You held that for a year? A. Yes.

Q. And after their license was terminated did you tear their account out of this book?

A. I never used the book for anything else.

Q. You did not tear that account out?

The COURT.—Don't repeat her answers, it is not necessary.

Mr. ERSKINE.—Very well, your Honor. [294]

Q. You state this was an account of the bills that were rendered. A. It was a list of the bills.

Q. Is it not a fact, Mrs. Crookston, that there were entered in that book the notes of Kooser and Spencer, and others, which were taken by Rees and Hine on account as a division of their royalties?

A. I don't know.

Mr. BARRY.—Just a moment, your Honor. I object to that part of the question which says "on account as a division of their royalties."

The COURT.—The objection is overruled. You may answer the question.

A. (Continuing.) I don't know.

Mr. ERSKINE.—Q. Will you state positively that there was not an entry in those books with respect to certain notes? A. No, I will not.

Q. I should say with respect to the notes of Kooser and Spencer and others having been received by Mr. Rees and Mr. Hine.

Mr. BARRY.—Just a moment. I object to the question, because the witness says she does not know what the contents of the book were.

(Testimony of Mary D. Crookston.)

The COURT.—Objection sustained. Anything further of this witness?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Then proceed with it.

Mr. ERSKINE.—Q. You have referred to certain entries which were made, and to certain statements which you prepared. Were those entries and these statements made in accordance with the Progressive Evaporator Company account contained in the book? A. Yes, sir.

Q. They were taken from those accounts, were they not?

A. Yes; the ledger sheets will show that [295]

Q. This is the ledger sheet to which you refer, is it not, Plaintiff's Exhibit No. 7? A. Yes, sir.

Q. Now, you state to this Court, as I understand you, that the moneys received and the notes received were applied to certain items at the request of Mr. Powell. A. Yes, sir.

Q. I want to call your attention to the statement of September 5, and I want to point out to the Court where the credits were applied to certain particular items, the credits commencing June 27 and running over to September 1st.

Mr. BARRY.—I object to the question as immaterial; the statements show the application, your Honor.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. You say that the statements which were rendered were taken from the statement which you have in your hand.

(Testimony of Mary D. Crookston.)

A. Yes, sir.

Q. Are you sure of that fact? A. Yes, sir.

Q. Where is the statement of the ledger sheet—

The COURT.—We will not wait for the witness to hunt for it. If it is there you can find it at any time, and if it is not there that fact will show for itself. Anything further of this witness?

Mr. ERSKINE.—Yes, your Honor.

Q. Did you have any conversation with either Mr. Rees or Mr. Hine after the statement of September 4 was rendered, the statements of September 4 and 5, about changing that statement in the next one and making it different in the next statement of October 6th?

A. May I see what you are referring to?

Q. What I am referring to is this. At the last hearing of this case Mr. Hine said something about the statements of September 4 and 5 being erroneous. I want to know if he pointed that out to you [296]

Mr. BARRY.—I object to the question as immaterial, irrelevant, and incompetent. The statement of October 6th was three weeks before this controversy started.

Mr. ERSKINE.—That does not make any difference.

The COURT.—It is not proper cross-examination for one thing. These statements show for themselves. Objection sustained.

Mr. ERSKINE.—I want to find out—

(Testimony of Mary D. Crookston.)

The COURT.—You might have a curiosity in finding out something, but is it material here? It is a mere fishing expedition. I cannot see that it is material. If you have anything material to put, put it; if not, the witness will vacate the stand.

Mr. ERSKINE.—Q. When did you cease to make entries in that small book we have heretofore referred to?

A. As it stands now, or do you mean concerning the Progressive Evaporator Company?

Q. Concerning the Progressive Evaporator Company?

A. I presume it had the entire list of royalties, but I could not say.

The COURT.—Q. You were asked if you remember the date.

A. No, I do not.

Mr. ERSKINE.—Q. Was that book ever shown to Mr. Neal?

A. Yes, sir.

Q. It was shown to Mr. Neal? A. Yes, sir.

Q. Were you present when it was shown to him?

A. Yes, sir.

The COURT.—Anything further?

Mr. ERSKINE.—Yes, your Honor.

Q. Did you ever check your accounts with the Progressive Evaporator Company accounts?

A. Yes, sir.

Q. When?

A. At the end of each month when I rendered the

(Testimony of Mary D. Crookston.)

statement, Mr. Powell and I checked, to know whether our books were in accord. [297]

Q. Did you go over and look at their books?

A. No, I never went and looked at their books. He would tell me whether the statements were in accord with his accounts, and I frequently corrected items on them, as you will see by these statements.

Q. You never checked with Mr. Powell's books?

A. No.

The COURT.—She has already answered that. Anything further?

Mr. ERSKINE.—That is all.

The COURT.—Call the next witness.

Mr. BARRY.—I want to recall Mr. Rees.

The COURT.—This witness was on the stand before, was he not?

Mr. BARRY.—Yes, your Honor.

The COURT.—Why do you want to call him again?

Mr. BARRY.—He was called to the stand before your Honor, by the plaintiff. I want to recall him now in my general case.

The COURT.—Very well.

TESTIMONY OF CLAUDE REES, FOR DEFENDANTS (RECALLED).

CLAUDE REES, recalled for defendants.

Mr. BARRY.—Q. Mr. Rees, reference was made in the examination of Mr. Lombard to a visit that you made to the Corporation Commissioner. You

(Testimony of Claude Rees.)

recall visiting the Corporation Commissioner at one time, do you not?

A. Yes, sir.

Q. About when was that?

A. In the latter part of October.

Q. What was your purpose in visiting the Commissioner at that time?

A. To ask him whether there was a permit whereby the Progressive Evaporator Company, Inc., still held a permit to sell stock, or whether it was revoked, or whether he could issue [298] stock to himself at that time.

Q. Who do you mean by "he"?

A. Mr. Lombard.

Q. Did you ask the Commissioner at that time to revoke any permit to sell stock? A. No, sir.

Q. Did you do anything at that time, or at any other time, to prevent the sale of stock of this corporation? A. No, sir.

Q. When you received from Mr. Powell the notes which are referred to in the testimony here, did you give him any receipt? A. Yes, sir.

Q. At the time that you gave a receipt, did you take a copy of the receipt from him?

A. Not that I know of.

Q. I show you a receipt dated September 8, 1922. Is that the receipt, or a copy of the receipt?

A. Yes, that is a copy.

Q. Does that refreshen your recollection concerning a copy of the receipt given at or about that time? A. Yes, sir, I know the list of notes.

(Testimony of Claude Rees.)

Q. This was given by you to Mr. Powell as receipt? A. Yes, sir.

Mr. BARRY.—I offer it in evidence, and as that it be marked defendants' exhibit next in order

(The document was here marked Defendant Exhibit "J.")

Q. Did you have any conversation with Mr. Lombard at or about the time that those notes were received? A. Yes, sir.

Q. Just state to the Court what that conversation was.

A. These notes were passed to me to find out whether I could borrow money on them.

Q. What was said at the time they were handed to you?

A. We discussed the proposition with reference to why he could not borrow money on these notes; we discussed the amount of discount which he had offered to anyone who would take the notes. [299]

Q. What did he state to you as the amount of the discount at that time?

A. 12 or 12½ per cent.

Q. Did you say anything to him as to what you would do with the notes if he would let you have them?

A. I would endeavor to borrow money on them.

Q. Was there any further conversation at that time concerning the notes, anything that you recall?

A. Not that I know of.

Q. Did you keep those notes in your possession

(Testimony of Claude Rees.)

after that time, or did you return them to Lombard, at all?

A. They were returned to Mr. Lombard for him to endeavor to borrow money on them.

Q. Did he ask you for them, or did you return them voluntarily? A. He requested the notes.

Q. Did you later on get the notes back from him?

A. Yes, sir.

Q. Did you have any conversation with him at that time about interest on the notes?

A. Yes, sir.

Q. What was the conversation that you had concerning that subject matter?

A. The conversation was this: Mr. Powell wanted to know what we were going to do with the interest accruing on the notes, and I stated that interest accruing on the notes would be credited to the Progressive Evaporator Company, Inc., as those notes were collected, and that the account of the Progressive Evaporator Company with the Rees Blowpipe Manufacturing Company would be charged interest.

The COURT.—What is the object of this?

Mr. BARRY.—It is with reference to one matter touched upon by Mr. Powell in his testimony, your Honor.

The COURT.—Well, what of that? Naturally, that interest belonged to the owner of the note.

Mr. BARRY.—Yes, your Honor.

Q. Did you attempt at that time, after the notes

(Testimony of Claude Rees.)

got into your [300] hands, to raise money on the notes?

A. Not after they got in my hands the second time.

Q. The first time? A. Yes, sir.

Q. What did you do for the purpose of trying to raise money on the notes?

Mr. ERSKINE.—That is objected to, your Honor, on the ground that it is immaterial, irrelevant, and incompetent, and not within the issues of the case.

The COURT.—Objection overruled.

Mr. ERSKINE.—Exception.

A. I took the notes to the bank, and they said no, they would not loan any money on that sort of paper.

Mr. BARRY.—Q. Did you have any conversation with Mr. Neal at or about the time that those notes were delivered to you, as to the amount of those notes, compared with the amount of indebtedness of those notes, compared with the amount of indebtedness of the Progressive Evaporator Company to your company?

A. Yes, sir.

Q. What was that conversation?

Mr. ERSKINE.—If your Honor please, I object to any conversation between these two gentlemen on the ground that it is immaterial, irrelevant, and incompetent.

The COURT.—What has this to do with the case?

Mr. BARRY.—Just to show that at that time

(Testimony of Claude Rees.)

they had a conversation in which Mr. Neal stated that Mr. Rees should not take an amount of notes greater than the amount that was owing at that time.

The COURT.—Who was Neal?

Mr. BARRY.—He was one of the directors of the corporation.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Did you ever tell Neal at any time that you had credited any of those notes toward the payment of [301] royalties?

A. No, sir.

Q. Did you ever tell Neal at any time that you had made any credits at all, or that the Progressive Evaporator Company was entitled to any credits at all on royalties? A. No, sir.

Q. Did you ever tell Neal at any time that you doubted the right of the Progressive Evaporator Company to cancel the license agreement? I will withdraw that question. Did you ever tell Neal at any time that you doubted the right of Rees and Hine to cancel the license agreement?

A. No, sir.

Q. Do you recall the meeting held on November 1st, when Lombard and Powell were removed as officers? A. Yes, sir.

Q. After that meeting was held, and after the removal took place, were you present at a time when Mr. Hine made demand for the books and records of the company? A. Yes, sir.

Q. Of whom was that demand made?

(Testimony of Claude Rees.)

A. That demand was made of Mr. Lombard.

Q. What was Mr. Lombard's reply at that time?

A. Mr. Lombard replied that the secretary of the company, Mr. Powell, was custodian of those books, and he had them in his possession.

Q. Did you try to locate Powell at that time?

A. Yes, sir.

Q. Had Powell been at the office during that week, that is to say, the week in which November 1st was one of the days? A. Yes, sir.

Q. What day was he there?

A. I believe the 26th day of October.

Q. And after that time, from the 26th of October until the meeting of the stockholders called by Lombard for the removal of the Board of Directors were you able to locate Powell at all?

A. No, sir.

Mr. ERSKINE.—Just a moment. If your Honor please, that is objected to as immaterial, irrelevant, and incompetent, [302] and not within the issues in this case. Whether they were able to locate the secretary of the company from October 26th to November 1st makes no difference. They were officers of this company from November 1st to January 13th.

The COURT.—I think so. Objection sustained.

Mr. BARRY.—All right, your Honor.

Q. Do you recall anything that was done on November 6th for the purpose of obtaining the books and records of this corporation?

Mr. ERSKINE.—The same objection to that.

(Testimony of Claude Rees.)

The COURT.—I think that all of that is in evidence. He finally got them in February.

Mr. BARRY.—That is correct, your Honor.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Did you and Mr. Hine make endeavors from November 1, 1922, to February 5, 1923, to get possession of the books and records of the company?

A. Yes, sir.

Mr. ERSKINE.—I object to that on the same grounds.

The COURT.—He may answer the general question. You can cross-examine him as to the details if you want to.

Mr. BARRY.—Q. Do you recall some notes that were turned over to Mr. Hine by the secretary of the Progressive Evaporator Company after the writ was issued by the Appellate Court?

A. Yes, sir.

Q. Did you see those notes at or about the time that they were turned over?

A. Not all of the notes.

Q. You did not see all of the notes?

A. I did not see them all.

Q. I show you a letter in evidence here, marked Defendant's Exhibit "G"; do you recall the receipt of that letter from Mr. Neal?

A. Yes, sir.

Q. It is addressed to both you and Mr. Hine?

A. Yes, sir.

Q. Was the interest received upon the notes

(Testimony of Claude Rees.)

which you had received [303] from Mr. Lombard credited upon the books of the Rees Blowpipe Manufacturing Company to the Progressive Evaporator Company? A. Yes, sir.

Mr. ERSKINE.—Your Honor, I wanted to object, but the witness answered so quickly that I didn't have a chance.

The COURT.—Well, what is your objection?

Mr. ERSKINE.—I object to the question on the ground that the books are the best evidence, and they are in evidence.

The COURT.—Objection sustained.

Mr. BARRY.—Q. Do you recall the time when the safe of the Progressive Evaporator Company was removed from the Humboldt Bank Building to the vaults of the Crocker National Bank?

A. Yes, sir.

Q. Who told you that?

A. We went to the office and found out that condition.

Q. And do you know whether the safe was sealed?

A. Yes, sir.

The COURT.—Anything further?

Mr. BARRY.—That is all, your Honor.

The COURT.—Cross-examine.

Cross-examination.

Mr. ERSKINE.—Q. Mr. Rees, when did you decide to get rid of Lombard as the president of the corporation?

A. I didn't catch that question, what was it?

(Testimony of Claude Rees.)

Q. I say when did you decide to hold those meetings that these disputes and controversies occurred at and get rid of Mr. Lombard as the president of the corporation?

A. We made a decision on October 24, when the company was not being managed in its proper shape.

Q. But prior to that time, when did you first decide that you would come to a show down with Mr. Lombard?

A. Not until that date. [304]

Q. When was the assignment of the Rees Blowpipe Company's patent which had been assigned to it, reassigned to you? Have you the assignment here? A. I don't think it is here.

Mr. ERSKINE.—Have you that, Mr. Barry?

Mr. BARRY.—No, I don't think so. I think he has the date of it there, though.

Mr. ERSKINE.—Q. What was the date of that?

The COURT.—Well, answer if you can.

A. It was in 1923, I think June 15, 1923.

Mr. ERSKINE.—Q. June 15, 1923.

A. Yes, sir.

Q. What is it you are looking at?

A. That is just a memo.

Q. A. Memo that you made? A. Yes.

Q. From the instrument, itself? A. Yes.

Q. That particular patent, up until June, 1923, stood in the name of the Rees Blowpipe Manufacturing Company? A. Yes, sir.

(Testimony of Claude Rees.)

Q. When you discussed this indebtedness of the Progressive Evaporator Company, you discussed all as one indebtedness, did you not?

A. No, sir.

Q. Did you not discuss it as one indebtedness consisting of different items? A. No, sir.

Q. Was not that the way you treated it?

A. No, sir.

Q. You have seen these statements, have you not? A. Yes, sir.

Q. And you took them to the Progressive Evaporator Company, yourself, when you would go to raise money.

Mr. BARRY.—You mean to collect money?

Mr. ERSKINE.—Yes, I should have said collect money.

A. Yes, sir.

Q. I will call your attention to the fact that in the September 5 statement it is all treated as one indebtedness, consisting of several different items now, was not that the way it was discussed? [30]

Mr. BARRY.—I object to that on the ground that the statement is the best evidence.

The COURT.—The witness has stated his version of it, and counsel is now asking the witness about it. I think he may do that. Proceed with the examination.

Mr. ERSKINE.—Q. I call your attention to the statements of September 4 and 5, and ask you about the royalties, and all the other indebtednesses a

(Testimony of Claude Rees.)

not all included as one indebtedness to the Rees Blowpipe Company, although separately itemized?

Mr. BARRY.—I object to that, because counsel is calling for nothing but the contents of the statements. He is not asking for the witness' conduct in connection with the statements.

The COURT.—I think he may inquire about it. The objection is overruled. Answer the question.

A. The amount of royalties was put on this statement for the sole purpose of notifying Mr. Lombard, who was then the president of this company, as to their total indebtedness.

Mr. ERSKINE.—I move to strike out the answer on the ground that it is not responsive.

Mr. BARRY.—Counsel is asking for that very kind of an answer.

The COURT.—Just make your question short and let him answer it.

Mr. ERSKINE.—Q. Does not that refresh your memory on the point that in discussing the general indebtedness of the Progressive Evaporator Company you discussed it as one indebtedness, including the royalties and other items?

A. No, sir.

Q. Is not that the way you dealt with it?

A. No, sir.

Q. In whose handwriting are the pencil figures at the foot of that statement of September 5?

A. They look like mine.

Q. The \$6,400 is a deduction you made from the total balance [306] due, is it not?

(Testimony of Claude Rees.)

A. Yes, sir.

Q. What was that \$6,400 represented by?

A. I could not tell you.

Q. Is it not a fact that it was represented by notes? A. I could not tell you.

Q. You don't know now?

A. No, sir, I would not state positively.

Q. But it is a credit proposed to be given, is it not?

Mr. BARRY.—I submit that the document shows for itself.

The COURT.—Yes.

Mr. ERSKINE.—The document does not show because it is in pencil memorandum at the foot of the document, and is in his own handwriting, and I have a right to inquire from him about it.

The COURT.—Well, if that is the situation you may ask him about it.

Mr. ERSKINE.—That is the situation, your Honor.

The COURT.—Answer the question.

A. I cannot tell you what it is, because there is nothing here to indicate what it is, and this was made four years ago.

Mr. ERSKINE.—Q. You got notes at the time that you rendered that statement, did you not, September?

The COURT.—Answer if you remember.

A. I don't remember.

Mr. ERSKINE.—Q. You rendered that statement on September 5, and did you not get this list of

(Testimony of Claude Rees.)

notes on September 8 which you have already put in evidence through your own counsel?

A. I got those, yes.

Mr. BARRY.—I submit that the two documents speak for themselves as to the dates.

The COURT.—Yes, I think so.

Mr. ERSKINE.—Q. Now, I will ask you about this item. [307] After you have substracted the \$6,400 there is an addition of \$2,300 is there not?

A. Yes.

Q. And that represents the cost of a plant, does it not? A. Yes.

Q. Then there is the addition of \$385; do you remember what that was? This is in your handwriting, too, is it not, this other little memorandum?

A. Yes.

Q. You made a memorandum, seven times fifty-five, \$385. What does that mean?

A. That evidently was royalty on a plant.

Q. That was royalty on a plant, wasn't it?

A. Yes.

Q. And you have added it in your figures, haven't you, to the entire indebtedness?

Mr. BARRY.—I submit that the statement will show that for itself, your Honor.

The COURT.—Let me see this. What are you asking about?

Mr. ERSKINE.—I am asking him if he added the \$385, which he admits was a royalty, on to the general indebtedness, in his own handwriting. Here it is right down here, your Honor.

(Testimony of Claude Rees.)

The COURT.—Well, it shows for itself.

Mr. ERSKINE.—But I have to identify it.

The COURT.—Proceed.

Mr. ERSKINE.—Q. Now, calling your attention to this statement of October 6th, whose figures are those in pencil on that statement?

A. Well, I will not swear they are mine.

Q. You will not? A. No.

Q. You don't know who put those there?

A. I will not swear they are mine.

Q. Calling your attention again to this addition of \$385, which was the royalty which you added into your figures, will you state now that you did not consider the royalty and the manufacturing plant items, and everything else, as one indebtedness, and treat it as such?

A. There would be a question on that. [308]

Mr. BARRY.—Just answer the question Mr. Rees.

A. I don't quite catch what he is after now.

Mr. ERSKINE.—Q. After having your memory refreshed that the \$385 was added by you in your own figures to the general indebtedness on that statement, will you say you did not treat the indebtedness for royalties and everything as one indebtedness composed of several items?

A. To the Rees Blowpipe Manufacturing Company?

Q. Yes. A. No, sir.

The COURT.—Proceed briskly with this witness

(Testimony of Claude Rees.)

Mr. ERSKINE.—Q. When you brought in the September statement, you received cash and notes, didn't you? That is what you would do, wouldn't you?

A Not always.

Q. But you did when you brought in the September statement? A. Evidently so.

Q. And you did when you brought in the October statement?

A. I only received one batch of notes. There were two bunches of notes that I received.

Q. Mr. Hine has made a statement that the September statement was in error; did you tell Lombard and Powell, when you brought the September statement in, and when you made those pencil memoranda on it, that it was erroneous?

A. We told them that that was one of the liabilities, that it consisted of some of the liabilities of the company and—

Mr. ERSKINE.—Now, just a moment. I move to strike that out, your Honor, on the ground that it is not a responsive answer.

The COURT.—Strike it out.

Mr. ERSKINE.—Q. Did you tell them at any time that the statements of September 4 and 5 were in error in showing that [309] indebtedness as a whole?

Mr. BARRY.—I object to the question on the ground that a statement was issued on October 6th which corrects the statement of September 4, and it speaks for itself.

(Testimony of Claude Rees.)

The COURT.—He may answer the question.

A. No, I did not tell them at that time.

Mr. ERSKINE.—Q. Did you tell them prior to the rendition of the statement on October 6th that those statements were in error?

A. No.

Q. You did not tell them, did you? A. No.

Q. At the date of the cancellation of this agreement on January 13, 1923, you held in your hands did you not, or the Rees Blowpipe Manufacturing Company did, or somebody did, all these notes which had been transferred to you, and which you had not yet collected? You had them, didn't you?

A. Yes.

Q. Certain of those notes were the Kooser notes and the Stevens note, were they not?

A. If they were not due I held them.

Q. I call your attention to this list—

The COURT.—Never mind showing him the list again. If what you want to ask him about is there treat it as a fact and base a question on it, and put it to the witness if you want to.

Mr. ERSKINE.—Q. Those Kooser notes were in the notes received shortly after that statement was rendered, were they not?

A. Yes.

Q. The Kooser notes were entered up in the royalty book, as I understand you, from your testimony last Thursday?

A. To the best of my knowledge.

(Testimony of Claude Rees.)

Q. Had you collected those Kooser notes at the time that you declared this license cancelled?

A. That depends on their due dates.

Q. Did you collect them at the time they were due? A. Yes, sir. [310]

Q. One of the notes was due on November 1, 1923, and one on November 1st, 1922. Did you collect the Stevens notes? Had you collected them at the time? A. I don't know the due dates.

Q. Will this list refresh your memory as to other notes that were entered up in that small book?

A. No.

The COURT.—Anything further of this witness?

Mr. ERSKINE.—Yes, your Honor.

Q. Did you ever tell Lombard, or notify Lombard after November 1st that you claimed that the entire royalties were due?

A. After November 1st?

Q. Yes.

A. I did not have much conversation with Lombard after that time.

Q. You knew where he lived, did you not?

A. Yes, sir.

Q. Did you ever write him a letter to the effect that you claimed that all the royalties were due and you were going to cancel the license?

Mr. BARRY.—I object to that question as immaterial, irrelevant, and incompetent.

The COURT.—It is not proper cross-examination.

(Testimony of Claude Rees.)

Mr. BARRY.—And also on the ground that it is not proper cross-examination.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Did you ever make a demand on Lombard or Powell after November 1 to take care of the royalties that you claimed were due on this license agreement?

Mr. BARRY.—The same objection.

The COURT.—Objection sustained.

Mr. ERSKINE.—May I have an exception to this last ruling?

The COURT.—Yes. Conclude with this witness.

Mr. ERSKINE.—Just another matter about the corporation [311] commissioner.

Q. Is it not a fact that when you went to the Corporation Commissioner you advised him that there was a dispute over the control of the company, and that you made statements to him about Mr. Lombard? A. No, sir.

Q. What did you say to him?

Mr. BARRY.—I urge the objection that that is immaterial, irrelevant, and incompetent, and is not proper cross-examination.

Mr. ERSKINE.—If your Honor please, I brought it out himself.

The COURT.—Yes. Objection overruled. Answer the question briefly.

A. I asked him if the Progressive Evaporator Company, Inc., still had a permit to sell stock, and whether the company's officers had the right to issue stock to themselves.

(Testimony of Claude Rees.)

Mr. ERSKINE.—Q. Did you complain about the fact to him that Lombard was issuing stock to himself?

A. I never knew it at that time, I don't believe.

Q. Is it not a fact that right after your visit the permit was cancelled, or shortly after that?

A. I don't know.

Mr. BARRY.—I object to the question as immaterial, irrelevant, and incompetent, and the record is the best evidence.

The COURT.—Objection sustained.

Mr. ERSKINE.—I think the record is already in evidence.

The COURT.—Then don't bother any more about it.

Mr. ERSKINE.—Q. As a matter of fact, you shortly afterwards asked permission of the Corporation Commissioner to revoke the suspension of the permit, so that you could purchase your shares of stock, did you not?

A. I don't know.

Mr. ERSKINE.—I think that will be admitted, will it not, Mr. Barry? [312]

Mr. BARRY.—What was that?

Mr. ERSKINE.—That on or about the 10th of November you asked permission to revoke—

Mr. BARRY.—Not to revoke, but to list a suspension so that he could take the same number of shares of stock that Lombard had issued to himself.

(Testimony of Claude Rees.)

Mr. ERSKINE.—And you admit that the power was revoked sometime before November 10th?

Mr. BARRY.—No, I won't admit that, because I don't know the date, but I will admit that it was after November 1st, but without stating any specific date.

Mr. ERSKINE.—That is all.

Redirect Examination.

Mr. BARRY.—Q. Did you have any purpose getting that suspension lifted at that time, other than to have issued to you, Neal and Hine, the same number of shares that Lombard had caused to be issued to himself and others?

A. No, sir.

Q. Did you ask for any more stock than he had issued? A. No, sir.

Q. I direct your attention to a statement dated October 6, 1922, there is no reference, whatever, to royalties upon that statement, is there?

Mr. ERSKINE.—I object to that, your Honor, on the ground that the document speaks for itself.

The COURT.—Objection sustained.

Mr. BARRY.—Q. At the time you brought that statement of October 6, 1922, did you demand the payment of the amount due to the Rees Blowpipe Manufacturing Company?

Mr. ERSKINE.—I object to the question as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness. [313]

Mr. BARRY.—It is about these very matters.

(Testimony of Claude Rees.)

your Honor, that counsel, himself, has questioned the witness.

The COURT.—The statement, itself, is a demand.

Mr. BARRY.—All right, your Honor.

Q. Did you at the same time, and in the course of the same conversation, say anything to Mr. Lombard about the royalty account on October 6, 1922? A. Yes, sir.

Q. Do you recall the conversation with him at that time about both accounts?

A. And Mr. Hine was present at that time, too.

Q. But do you recall that conversation about both accounts?

A. I asked him how he was going to pay the royalty account.

Q. On those occasions when you conversed with Mr. Lombard about these statements and these various indebtednesses, did you speak to him about both indebtednesses? A. Separately.

Mr. ERSKINE.—Your Honor, I object to that on the ground that it is immaterial, irrelevant, and incompetent, and not proper redirect examination, or else I want the right to cross-examine the witness on that.

The COURT.—You examined him about that; you asked him if he discussed it all as one indebtedness; the objection is overruled.

Mr. ERSKINE.—Exception.

A. (Continuing.) Those accounts were always discussed separately. There was never any lump

(Testimony of Claude Rees.)

sum at all, with the exception unless they were discussing the liabilities of that company.

Mr. BARRY.—Q. Then you discussed them lump sums. Is that correct?

A. Yes, lump sums regarding the liabilities of the company.

Q. I notice here a Kooser note dated July 1922, and payable on November 1, 1922; do you recall who collected that note?

A. The Rees Blowpipe Company. [314]

Q. How was that note applied when it was collected on or about November 1, 1922?

Mr. ERSKINE.—That is objected to on the ground that it is immaterial, irrelevant and incompetent and the books are the best evidence.

Mr. BARRY.—I will withdraw the question. That is all.

TESTIMONY OF H. B. NICHOLS, FOR DEFENDANTS.

H. B. NICHOLS, called for defendants, sworn.

Mr. BARRY.—Q. Mr. Nichols, are you connected with the Mercantile Trust Company, of this city and county?

A. I am.

Q. In what capacity?

A. Assistant trust officer.

Q. Did you bring with you here a record, that is a file of that company pertaining to the stock issues of the Progressive Evaporator Company?

(Testimony of H. B. Nichols.)

A. I have.

Q. Have you in that file a letter received from Norman Lombard, purporting to be president of that company, on or about November 1, 1922, with reference to the issue of stock, together with a letter signed by Messrs. Neal and Hine?

A. I have a letter here signed by M. A. Neal and Charles F. Hine.

Q. That is to say, you have another letter, dated November 2d. A. Yes, sir.

Q. Let me put it this way. You have produced from this file two letters addressed to your company, one signed by Norman Lombard, and the other signed by M. A. Neal and Charles F. Hine.

A. I have.

Mr. BARRY.—I offer both of those letters in evidence and ask that they be marked defendants' exhibit next in order. They are both dated November 2, 1922, the one signed by Neal and Hine states that they were elected president and secretary of the corporation [315] and notifying the Mercantile Trust Company not to register any certificates of the preferred and/or common stock of the Progressive Evaporator Company, Inc., unless the same are issued and signed by M. A. Neal and Charles F. Hine as president and secretary, respectively, of said company. The other letter, signed by Norman Lombard, is advising the Mercantile Trust Company to take notice that in view of the fact that certain persons may claim to hold certain official positions with this company without warrant

(Testimony of H. B. Nichols.)

of law therefor, you are hereby instructed and advised to honor no requests in behalf of this company except from those who *may thereunto* legally authorize.

(The letters were here marked Defendants' Exhibit "K.")

Q. Have you any other correspondence with reference to that subject matter?

A. I have the entire file here, to the best of my knowledge and belief.

Mr. BARRY.—That is all.

The COURT.—Cross-examine.

Mr. ERSKINE.—No questions.

Mr. BARRY.—Just one second, please. Will you admit, Mr. Erskine, that at the time that certain shares of stock were registered, or, rather, at the time that Mr. Neal and Mr. Hine attempted to have certain shares of stock registered on or about November 6, 1922, that the Mercantile Trust Company attached to the certificates the document which I now show you?

Mr. ERSKINE.—Well, if that is the fact, yes.

Mr. BARRY.—Yes, that is the fact.

Mr. ERSKINE.—And subject to its relevancy. In other words, I admit it subject to its relevancy.

Mr. BARRY.—I offer the document in evidence.

Mr. ERSKINE.—I object to it as immaterial, irrelevant, and incompetent. [316]

The COURT.—What is it?

Mr. BARRY.—It is a statement dated November 6, 1922, signed by the vice-president of the Mercan

(Testimony of H. B. Nichols.)

tile Trust Company, attached to the certificate of stock issued to Norman Lombard and others, to the effect that "we have been notified by the affidavit of Norman Lombard, who affirms himself to be president of the Progressive Evaporator Company, that said certificate is not valid, and that the persons signing the same are not officers of the company."

The COURT.—Objection sustained. Call your next witness.

TESTIMONY OF EDWARD I. BARRY, FOR DEFENDANTS.

EDWARD I. BARRY, called for the defendants, sworn.

Mr. BARRY.—There is no objection, is there, your Honor, to my arguing the case and testifying to certain matters?

Mr. ERSKINE.—Oh, no, I have no objection.

The COURT.—Very well, if there is no objection.

The WITNESS.—Mr. Lombard referred in his testimony to a conversation that he stated he had with me, in which I stated to him, in substance, that our client intended to cancel the license agreement, and that if he won in the Superior Court he could not accomplish anything. At that time, and in the course of that conversation, I remember quite distinctly that I told Mr. Lombard that a certain sum—I don't remember the amount—was due to our people for royalties, and that that was the

(Testimony of Edward I. Barry.)

reason why they had cancelled the license agreement.

Mr. Neal testified in this matter that I at one time told him that if he took a certain position in connection with this matter, that he would be a traitor. I recall very distinctly that on one occasion—probably the one testified to [317] by Mr. Neal—that he came to my office and there he had a conversation with me in which he asked that I have Mr. Rees and Mr. Hine sign a paper agreeing to pay him \$15 a truck as his share of the royalties upon equipment sold to the Progressive Evaporator Company, and to have the agreement show that they would pay that to him when they collected the royalties—

Mr. ERSKINE.—Just a moment. I would like to move to strike out that part of what Mr. Neal said to Mr. Barry as immaterial, irrelevant and incompetent, and not within the issues of the case and not proper defense. There was no foundation laid for it.

The COURT.—Read the answer given by the witness. (Record read.) Is that all of it?

Mr. BARRY.—No, that is not all the conversation.

The COURT.—What is the object of this?

Mr. BARRY.—Mr. Neal testified he had a certain conversation with me, I want to give the full extent of the conversation.

The COURT.—All right, we will let the witness

(Testimony of Edward I. Barry.)

proceed and finish his answer, and then after it is finished you can move to strike.

A. (Continuing.) At that time Mr. Neal made some mention of this book that has been introduced in evidence, here. That is the first time that the subject matter was ever discussed with anybody. I immediately took the matter up with Mr. Rees and as I understand it the conversation practically closed there. My recollection is that I spoke in even stronger terms than "Traitor" to Mr. Neal at that time, because, from the trend of his conversation I practically accused him of making some kind of a deal with Lombard in connection with this matter.

Mr. ERSKINE.—Now, Mr. Barry, I think you have practiced [318] enough in these courts to know that the statement "because" is immaterial, irrelevant, and incompetent, and it is your conclusion, and I think it ought to be stricken out.

A. (Continuing.) That is substantially what I said to him. That is the import of my testimony.

The COURT.—Q. Did you tell him the because?

A. I would not say that I used that word, your Honor, but substantially I told him those very things.

The COURT.—The answer may stand over the motion to strike, and in so far as it is not relevant or material it will be ignored by the Court. Counsel has an exception. You may cross-examine.

Mr. ERSKINE.—No cross-examination.

Mr. BARRY.—That is the defendants' case.

(Testimony of Edward I. Barry.)

The COURT.—Is there any rebuttal?

Mr. ERSKINE.—Yes, your Honor.

The COURT.—Call your witness.

TESTIMONY OF M. A. NEAL, FOR PLAINTIFF
TIFF (RECALLED IN REBUTTAL).

M. A. NEAL, recalled for plaintiff in rebuttal.

The COURT.—Now, Counsel, remember what I said in rebuttal in this case, and don't go over any matter in chief again.

Mr. ERSKINE.—Q. When did you and Mr. Hine and Mr. Rees first discuss of getting rid of Lombard?

Mr. BARRY.—I object to the question on the ground that it is not rebuttal.

Mr. ERSKINE.—Yes, it is, your Honor.

The COURT.—It may be. Rees gave a certain date for that. He may answer the question. Objection overruled.

A. Sometime between the middle of September and the 1st of [319] October, prior to my trip to the Bates Ranch, in putting up their large plan

Mr. ERSKINE.—Q. Was any mention made in your discussions respecting the revocation of the license, and prior to its revocation? Was any mention made of the fact that the corporation could not go ahead and could not function, because of Mr. Lombard's opposition to the removal of the directors?

Mr. BARRY.—The same objection, it is not rebuttal.

(Testimony of M. A. Neal.)

The COURT.—Objection sustained.

Mr. ERSKINE.—May we have an exception to that ruling?

The COURT.—Yes, if you take it.

Mr. ERSKINE.—That is all.

The COURT.—Cross-examine.

Cross-examination.

Mr. BARRY.—Q. Although you had this conversation between the middle of September and the 1st of October, there was never a word between you, and Mr. Hine, and Mr. Rees about cancelling the license agreement until after November 1, 1922, was there?

A. Yes, sir.

Q. You testified here the other day that it was in November that that matter was first discussed; which testimony is correct?

Mr. ERSKINE.—I object to that, your Honor, as improper.

Mr. BARRY.—I will stand on the record.

Mr. ERSKINE.—The record is here that it was from the time the row started.

Mr. BARRY.—And the record is that it was in November.

The COURT.—Never mind that, Counsel. The record is here to speak for itself. Of course, the witness is not bound by counsel's statement.

A. May I make a statement?

Mr. BARRY.—No, answer the question. [320]

The COURT.—Of course, he is not bound to accept your statement of it.

A. I believe that the second testimony is correct because it was mentioned about the royalties not being paid, and that the notes had not been collected.

Mr. BARRY.—Would your Honor permit me to run through his testimony on that?

The COURT.—No, he has answered. The record will speak for itself.

Mr. BARRY.—Then that is all, your Honor.

TESTIMONY OF NORMAN LOMBARD, FOR PLAINTIFF (RECALLED IN REBUTTAL).

NORMAN LOMBARD, recalled for plaintiff rebuttal.

Mr. ERSKINE.—If your Honor please, I offer what is marked as Plaintiff's Exhibit No. 13 for identification, which is the shorthand statement of what occurred on October 27, 1922. I do it in rebuttal of Mr. Hine's statement, that nothing was said at any time to Mr. Lombard about cancelling the license when the row first started.

Mr. BARRY.—This was gone into in full upon the examination of Miss Daniels, and also upon the examination of Mr. Lombard. This is a very voluminous document, your Honor.

Mr. ERSKINE.—It contains a stenographic report of the statements made at that time.

The COURT.—Statements by whom?

Mr. ERSKINE.—Statements by all of the parties. It shows that Mr. Lombard said on October

27th that he was perfectly willing to be eliminated as president of the company if he would be given the assurance that the license would not be attacked.

The COURT.—Objection sustained.

Mr. ERSKINE.—Furthermore, I offer it for this reason, to [321] show that at that very time, on October 27, the question of the application of these notes and cash was also discussed, and to show that it was not a settled proposition, and that the statements of October 6th and 26th were not acquiesced in by Mr. Lombard and Mr. Powell.

Mr. BARRY.—I urge the objection to that that it is not rebuttal, in addition to the other objections.

The COURT.—Objection sustained.

Mr. ERSKINE.—May I have an exception to that ruling, your Honor?

The COURT.—If you take it it will be noted.

Mr. ERSKINE.—Q. Mr. Lombard, were you at any time asked, subsequent to November 1st, to produce money, or given a chance or opportunity to pay these royalties?

Mr. BARRY.—I object to the question on the ground that it is not rebuttal, and calls for the conclusion of the witness.

The COURT.—After what time?

Mr. ERSKINE.—After November 1st, after they were president and secretary of the company.

The COURT.—Objection sustained. There was a different secretary and president at that time.

Mr. ERSKINE.—I will ask for an exception to the ruling.

The COURT.—Let it be noted.

Mr. ERSKINE.—Q. Were you ever asked for the contracts or for the notes which were in your possession at that time, by either Rees or Hine, for the purpose of raising money to pay these royalties?

Mr. BARRY.—I object to the question on the ground that the pleadings specifically allege that this gentleman held all of the records and papers of the company until the District Court of Appeals passed upon the matter, and that it was his [322] intention at that time to so hold them.

The COURT.—Objection sustained.

Mr. ERSKINE.—Q. Did you ever have any discussion of any kind with either Mr. Neal, Mr. Rees or Mr. Hines, after November 1st, in which an request was made of you in connection with royalties, or in connection with paying the royalties?

Mr. BARRY.—The same objection, your Honor.

The COURT.—Objection sustained. That has been ruled on before, Counsel.

Mr. ERSKINE.—May I have an exception, your Honor?

The COURT.—You will have it if you take it.

Mr. ERSKINE.—Q. Were you ever told by them after November 1st that they considered the entire royalty account unpaid, and they were going to forfeit the license if it was not paid?

Mr. BARRY.—The same objection. That matter was covered in the direct case.

(Testimony of Norman Lombard.)

The COURT.—Objection sustained. I don't know why they should tell him. He was no longer president of the company, if I remember the evidence rightly.

Mr. ERSKINE.—Q. Were you ever given an opportunity to borrow money on notes or contracts, or to assist them in borrowing money on notes or contracts after November 1st, with which to pay the claimed royalties?

Mr. BARRY.—The same objection.

The COURT.—Objection sustained.

Mr. ERSKINE.—Exception.

Q. Were you ever asked by them to produce the contracts and notes, so that they might use them to raise money to pay themselves the royalties due under the license agreement?

Mr. BARRY.—The same objection.

The COURT.—Objection sustained. [323]

Mr. ERSKINE.—Q. Did you know that Mr. Neal had an interest in the royalties, or claimed an interest in the royalties of \$15 per truck?

Mr. BARRY.—The same objection. This was brought out in chief.

The COURT.—What is the object of that?

Mr. ERSKINE.—The claim is made that Neal had an interest.

The COURT.—What is the object of it?

Mr. ERSKINE.—Because Lombard was the president of the company, and these three men were concealing that fact from him. We have the posi-

(Testimony of Norman Lombard.)

tion here of three directors all interested in the very transaction. I want to show that this witness had no knowledge of that fact.

The COURT.—He may answer the question. If not material or competent, the Court will give no consideration. Objection overruled. Answer the question.

A. I had no knowledge of it until Mr. Neal testified to it here last Friday.

Mr. ERSKINE.—Q. That is the first knowledge you had that he had an interest in the license agreement?

A. Yes.

Q. I want to call your attention to the Rees Blowpipe Manufacturing Company account in this book with the Progressive Evaporator Company, and ask you whether or not it is a fact that you dealt with and treated this indebtedness for royalties, and for manufacturing, etc., as one indebtedness to the Rees Blowpipe Company?

Mr. BARRY.—The same objection, it is not rebuttal, and it is immaterial, irrelevant, and incompetent.

Mr. ERSKINE.—I think it is rebuttal, your Honor.

Mr. BARRY.—And also that the books are the best evidence. [324]

The COURT.—I think it was gone into fully in chief, so far as that goes. As a matter of course the same evidence must serve in chief as in rebuttal. He may answer briefly.

(Testimony of Norman Lombard.)

A. It was all treated as one account by all parties.

Mr. BARRY.—I move to strike out “by all parties” as the conclusion of the witness.

The COURT.—The latter portion will be stricken.

Mr. ERSKINE.—Q. Was this account of the Rees Blowpipe Manufacturing Company made under your direction?

A. Under my general direction; I would not say as to just how detailed my directions to Mr. Powell were at the time.

Q. Up to the change which is made here in red ink, after October 31, are the memos. in Mr. Powell’s handwriting?

Mr. BARRY.—Mr. Erskine, we will admit that the red ink writing in there is the beginning of the new writing after this trouble arose; in other words, we had it put down in red ink so that there would not be any misunderstanding about it.

A. I think down to that date that is Mr. Powell’s handwriting, yes.

Mr. ERSKINE.—I don’t think this particular account is in evidence, and it is necessary to have it in order to elucidate the other accounts. I offer it in evidence at this time and ask to have it considered read.

Mr. BARRY.—It is in.

Mr. ERSKINE.—No, I don’t think this is.

The COURT.—I will admit it.

(The reference is to part of Plaintiff’s Exhibit No. 11.)

(Testimony of Norman Lombard.)

Mr. ERSKINE.—Q. Mr. Lombard, at the time of the discussions on October 24, and 25, and 27, etc., do you recollect any conversation being had about the fact that there was a difference in opinion between you, on the one hand, and Mr. Rees, and [325] Mr. Hine, on the other, as to how these payments should be applied?

Mr. BARRY.—I object to the question as immaterial, irrelevant, and incompetent, and not rebuttal.

Mr. ERSKINE.—Yes, your Honor, it is rebuttal.

The COURT.—He may answer. Objection overruled.

A. I don't recall exactly what that conversation was. It was very heated, and at considerable length. The memorandum there will state it. It was taken down by a stenographer at the time, and I would very much prefer to be bound by that, or to consult that, before answering the question.

The COURT.—Well, you have had enough time to read that over before coming into court; you must do that on your own time, not mine.

Mr. ERSKINE.—Q. Will you give your best recollection of what was stated about these notes, and their application?

Mr. BARRY.—I object to the question as immaterial, irrelevant, and incompetent, and not rebuttal, and that very matter was gone into on the direct case.

(Testimony of Norman Lombard.)

The COURT.—Objection overruled. He may answer.

A. There were discussions there about differences of opinion, but I don't recall whether it was on that particular feature or not.

The COURT.—Anything further of this witness?

Mr. ERSKINE.—I think that is all.

The COURT.—Cross-examine.

Mr. BARRY.—That is all.

Mr. ERSKINE.—We rest, your Honor.

The COURT.—Do you want to argue this case now, Gentlemen?

Mr. ERSKINE.—Just as your Honor desires in the matter. [326]

Mr. BARRY.—I want to make a motion in connection with the matter, your Honor.

The COURT.—State it.

Mr. BARRY.—I move at this time, for the purpose of preserving the record, for a dismissal of the action here in so far as these defendants are concerned, upon each and every of the following grounds:

That the plaintiff has failed to establish the material allegations, and each and all of the material allegations of the complaint, or any thereof.

That the plaintiff has failed to prove or establish any conspiracy such as is alleged in the bill of complaint in this action.

That the plaintiff has failed to show that the Progressive Evaporator Company was not in default

in the payment of royalties at the time the notice of cancellation was served upon it, and has failed to show that the license agreement was not legally cancelled.

The evidence here shows that a large amount of royalties, to wit, \$7,260, became due and were due at the date that the notice of cancellation was given.

Upon the further ground that the infringement here, is in connection particularly with an infringement due to a contract entered into with the Progressive Dehydrator Company, and the evidence in this action shows that the Progressive Dehydrator Company has long since ceased to operate under any agreement, license agreement or otherwise, with Messrs. Hine and Rees, and that no such agreement is in existence at this time, and, therefore, there is no basis for the prosecution of the action.

That under all the circumstances of the case, as disclosed [327] by the evidence, there is an absolute want of equity in the case as presented by the plaintiff in this action.

The COURT.—Do you want to brief this?

Mr. ERSKINE.—I would prefer to brief it, your Honor.

Mr. BARRY.—I think that would be the better plan.

The COURT.—Yes, I think so. There is a good deal of evidence here. I want you to point out to me what is material. The motion you just made is not really necessary, but it will be taken under advisement.

(Thereupon, by consent, the cause was submitted upon briefs to be filed, 15 days on each side.)

[Endorsed]: Filed Aug. 2, 1926. [328]

(Title of Court and Cause.)

NOTICE TO JOIN IN APPEAL.

To Edward B. Ward and M. A. Neal, and each of them individually and as copartners doing business under the firm name and style of Progressive Dehydrator Company, defendants above named.

YOU and each of you are hereby notified and invited to join with us, the undersigned defendants in the above-entitled cause on or before the tenth day of January, 1927, in taking and prosecuting an appeal in said cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in said cause made and entered against you and said undersigned defendants on the thirteenth day of December, 1926, and in the event you or either of you fail or refuse within said time so to join in taking and prosecuting said appeal you and each of you so failing or refusing will be deemed to have acquiesced in such decree and waived your right to appeal therefrom and said undersigned defendants shall prosecute said appeal without joining as a party you or either of you

so failing or refusing to join in taking and prosecuting said appeal.

CLAUDE REES,
CHARLES F. HINE,
REES BLOWPIPE MANUFACTURING
CO., INC.

By WM. K. WHITE,
CHAS. M. FRYER,
Attorneys for Said Defendants. [329]

ORDER SHORTENING TIME.

Good cause appearing therefor it is hereby Ordered that the time for serving the foregoing notice to join in appeal may be and the same is hereby shortened so that said notice will be served in time if served on or before the 7th day of January, 192

FRANK H. KERRIGAN,
Judge. [330]

(Title of Court and Cause.)

AFFIDAVIT OF SERVICE OF NOTICE TO
JOIN IN APPEAL.

State of California,
City and County of San Francisco,—ss.

Marcus Lothrop, being first duly sworn, deposes and says that he is and at all of the times herein mentioned, was a citizen of the United States and of the State of California and a resident of the city of Berkeley, County of Alameda in said State, over

the age of twenty-one years and not a party to or interested in the above-entitled suit, that on the sixth day of January, 1927, at the hour of 4:40 P. M., of said day served the annexed notice to join in appeal upon M. A. Neal one of the defendants named in and a party to the above-entitled cause, by delivering to and leaving with said M. A. Neal personally a copy of said notice and at the time of said delivery to him of said notice, said M. A. Neal was within the city and county of San Francisco, State of California.

MARCUS LOTHROP.

Subscribed and sworn to before me this 7th day of January, 1927.

[Seal] W. W. HEALY,
Notary Public in and for the City and County of
San Francisco, State of California.

Service of the within notice to join in appeal admitted this 6th day of January, A. D. 1927.

EDWARD B. WARD,
Defendant.

[Endorsed]: Filed Jan. 8, 1927. [331]

(Title of Court and Cause.)

PETITION OF DEFENDANTS CLAUDE REES,
CHARLES F. HINE, REES BLOWPIPE
MANUFACTURING COMPANY, INC., AND
PROGRESSIVE EVAPORATOR COM-
PANY, INC., FOR ORDER ALLOWING
APPEAL.

The defendants herein, Claude Rees, Charles F.

Hine, Rees Blow Pipe Manufacturing Company, Inc., a corporation, and Progressive Evaporation Company, Inc., a corporation, feeling themselves aggrieved by the decree for an injunction and accounting made and entered in the above-entitled cause on the 13th day of December, 1926, come now by their solicitors and counsel and pray this Court for an order allowing said defendants to prosecute an appeal from said decree for an injunction and accounting to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in the behalf made and provided, and also that an order be made fixing the amount of security which said defendants shall give and furnish, and that upon such security being given, the accounting ordered in and by said decree be suspended and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals.

WM. K. WHITE,

CHAS. M. FRYER,

Solicitors and Counsel for Defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporation Company, Inc.

[Endorsed]: Filed Jan. 11, 1927. [332]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS OF DEFENDANTS CLAUDE REES, CHARLES F. HINE, REES BLOW PIPE MANUFACTURING COMPANY, INC., AND PROGRESSIVE EVAPORATOR COMPANY, INC.

Now come Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., a corporation and Progressive Evaporator Company, Inc., a corporation, defendants above named and specified and assign the following as the errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree for an injunction and accounting made and entered in the above-entitled cause on the 13th day of December, 1926.

1. The above-entitled court, to wit, the District Court of the United States for the Northern District of California and Southern Division thereof erred in granting against the five defendants named in said decree, to wit, Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., M. A. Neal individually and as copartner in Progressive Dehydrater Company and Edward B. Ward, as copartner in said Progressive Dehydrater Company, the injunction contained in and ordered by said decree.

2. Said court erred in awarding against said five defendants or any of them an accounting of any damages or profits.

3. The said court erred in granting any relief whatever against said five defendants or any of them.

4. The said court erred in not dismissing the bill of complaint.

5. The said court erred in finding or adjudging that United States letters patent number 1,413,133 issued on April 18, 1922, to defendant Rees Bloch Pipe Manufacturing Company, Inc., had been infringed by said five defendants or any of them
[333]

6. The said court erred in finding or adjudging that said letters patent had been infringed by said five defendants jointly.

7. The said court erred in not adjudging and decreeing that none of said five defendants infringed upon said letters patent or any claim therein.

8. The said court erred in finding or adjudging that pending applications serial number 429,293 filed December 9, 1922, and serial number 408,703 filed September 7, 1920, or either of them had been infringed by said five defendants or any of them.

9. The said court erred in adjudging and decreeing that said five defendants or any of them be enjoined from infringing the said applications for letters patents or either of them.

10. The said court erred in not adjudging and decreeing that it had no jurisdiction to find in

fringement of or restrain alleged infringement of said pending applications for letters patent, or either of them.

11. The said court erred in adjudging or decreeing that said five defendants or any of them be enjoined or restrained from making or selling or causing to be made or sold any device of apparatus embodying or containing the or any of the inventions described and claimed in and by said or either of said applications for letters patent for use in the drying of fruit substances.

12. The said court erred in not granting the motion of the four defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Dehydrater Company, Inc., for dismissal of the bill of complaint upon the ground that plaintiffs had failed to establish the material allegations and each of them of the bill of complaint.

13. The said court erred in denying said motion of said four defendants for dismissal of the bill of complaint upon the ground that plaintiffs had failed to prove or establish any conspiracy such as is alleged in the bill of complaint. [334]

14. The said court erred in denying said motion of said four defendants for dismissal of the bill of complaint upon the ground that the plaintiffs had failed to show that the license agreement of February, 1922, to defendant Progressive Evaporator Company was valid or in existence at the time of the alleged acts of infringement complained of.

15. The said court erred in not finding or adjudging that there is no evidence in the record showing any manufacture, use or sale by said first defendants or any of them, of any device embodying any invention patented in and by said letters patent number 1,413,135.

16. The said court erred in not finding or adjudging that there is no evidence in the record showing any joint manufacture, use or sale by said first defendants or any of them, of any device embodying said invention patented in and by said letters patent number 1,413,135.

17. The said court erred in not finding and adjudging that there is no evidence in the record to show that any device complained of as an infringement of said letters patent embodied any invention covered by any claims or claim of said letters patent.

18. The said court erred in not finding and adjudging *there* there is no evidence in the record showing the existence of any specification for said letters patent.

19. The said court erred in not finding and adjudging that there is no evidence in the record showing the existence of any drawings for said letters patent.

20. The said court erred in not finding and adjudging that there is no evidence in the record showing the existence of any claim or claims of said letters patent.

21. The said court erred in adjudging or decreeing in the absence of any proof of the drawing

specification and claims of said letters patent that said five defendants or any of them had infringed said letters patent. [335]

22. The said court erred in not finding and adjudging that there is no evidence in the record showing the construction or operation of any device complained of as an infringement of said letters patent.

23. The said court erred in adjudging or decreeing in the absence of any proof of the construction and mode of operation of the device complained of as an infringement that said five defendants or any of them had infringed said letters patent.

24. The said court erred in adjudging or decreeing against said five defendants or any of them an accounting of any damages or profits because of any infringement of said pending applications or either of them.

25. The said court erred in awarding any relief against said five defendants or any of them for breach of or for infringement of any rights under the license agreement of February, 1922, referred to in said decree.

26. The said court erred in not adjudging and decreeing that it had no jurisdiction to award any relief against said five defendants or any of them for breach of or for infringement of any rights under said license agreement of February, 1922, referred to in said decree.

27. The said court erred in not adjudging and decreeing that it had no jurisdiction to award and accounting of damages or profits against said five defendants or any of them for violation of said

license agreement of February, 1922, referred in said decree.

28. The said court erred in finding and adjudging that defendant Progressive Evaporator Company, Inc., is now and ever since the 10th day of February, 1922, has been the owner and holder of said license agreement of February, 1922, and all the rights, benefits and privileges created by said agreement.

29. The said court erred in not adjudging and decreeing that said license agreement of February, 1922, and all of the rights, benefits and privileges thereby created were cancelled, annulled and revoked on or about January 12, 1923, and at all times thereafter ceased to exist. [336]

30. The said court erred in finding or adjudging that the attempted cancellation of said license agreement by defendants Claude Rees and Charles F. Hine was invalid, void and of no effect.

31. The said court erred in finding or adjudging that the infringement referred to in said decree continued after full and due notice of defendant Progressive Evaporator Company, Inc.'s rights charged in the bill of complaint.

32. The said court erred in finding and adjudging that said five defendants or any of them since the 13th day of January, 1923, or at any other time or at all have infringed upon any exclusive or any right or privilege of Progressive Evaporator Company, Inc., under said license of February, 1922, referred to in said decree.

33. The said court erred in adjudging or decreeing that said five defendants or any of them, their officers, agents, servants, attorneys, workmen and employees or any of them be enjoined or restrained from making or selling or causing to be made or sold any device or apparatus embodying or containing the invention described and claimed in and by said letters patent.

34. The said court erred in not adjudging and decreeing that plaintiffs failed to sustain the burden of proof upon them to establish infringement of the patent in suit.

35. The said court erred in adjudging or decreeing against said five defendants or any of them an accounting of any damages or profits because of any infringement of said letters patent in suit.

36. The said court erred in awarding plaintiffs any attorney's fee in this suit. [337]

37. The said court erred in not adjudging and decreeing that it has no jurisdiction to award attorney fees to any of the parties to this suit.

38. The said court erred in finding and adjudging that defendants Rees and Hine assigned the patent in suit to defendant Rees Blow Pipe Manufacturing Company at or about the time of the grant of the license of February, 1922, to defendant Progressive Evaporator Company, Inc.

39. The said court erred in not finding and adjudging that said assignment of said patent was made prior to the grant of said license and prior to the issuance of said patent.

40. The said court erred in finding and adjudg-

ing that after the cancellation of the license agreement of February, 1922, "plants of the patent, by the licensees or licensors or both, have been manufactured and sold."

41. The said court erred in finding and adjudging that "It is very obvious that plaintiffs are entitled to recover as they pray the royalties were due to the Rees Corporation, whether it held the patent for itself or as trustee for Rees and Hine."

42. The said court erred in not adjudging and decreeing that defendants Rees and Hine and not Rees Blow Pipe Manufacturing Company, Inc. were at all times during the existence of said license the owners of all but the bare legal title to said patent and that Rees Blow Pipe Manufacturing Company, Inc., held said title in trust for them.

43. The said court erred in finding and adjudging that defendants Rees and Hine at any time owned half the common stock of defendant Progressive Evaporator Company, Inc.

44. The said court erred in not adjudging and decreeing that royalties under said license were due and payable solely to defendants Rees and Hine and not to Rees Blow Pipe Manufacturing Company, Inc. [338]

45. The said court erred in adjudging and decreeing that royalties under said license accrued or were payable to defendant Rees Blow Pipe Manufacturing Company, Inc.

46. The said court erred in finding and adjudging that Rees Blow Pipe Company, Inc., and not

defendants Rees and Hine had the right to invoke forfeiture of said license.

47. The said court erred in finding and adjudging that the notice from Rees and Hine to Progressive Evaporator Company, Inc., of cancellation of said license was for more than the exact amount due.

48. The said court erred in not adjudging and decreeing that said notice of cancellation was by the proper parties, valid and effectual and forfeited and cancelled said license.

49. The said court erred in not adjudging and decreeing that the defendant Progressive Evaporator Company, Inc., on or about January 12, 1923, had failed to pay the royalties due and payable under said license.

50. The said court erred in finding and adjudging that "in cash and purchaser's notes in payment or security about all due the Rees Corporation on both accounts had been received by it."

51. The said court erred in finding or adjudging that any payments or notes received by defendant Rees Blow Pipe Manufacturing Company, Inc., from Progressive Evaporator Company, Inc., were payment of any royalties due defendants Rees and Hine under said license.

52. The said court erred in finding or adjudging that any payments or notes received by defendant Rees Blow Pipe Manufacturing Company, Inc., were received in trust to be applied to the payment of royalties due under said license. [339]

53. The said court erred in finding or adjudging that forfeiture of said license had been waived at any time either by defendants Rees & Hine or by Rees Blow Pipe Manufacturing Company, Inc.

54. The said court erred in not adjudging and decreeing that by reason of their pleadings on file herein plaintiffs are estopped from asserting that any note given by defendant Progressive Evaporator Company to Rees and Hine or Rees Blow Pipe Manufacturing Company, Inc., was given as payment and not as security for any royalty due under said license.

55. The said court erred in not finding and adjudging that at the time of the giving of notice of cancellation of said license agreement defendant Progressive Evaporator Company, Inc., had failed to pay its total indebtedness for royalties under said license and for machines purchased from Rees Blow Pipe Manufacturing Company, Inc.

56. The said court erred in finding or adjudging that forfeiture of said license had so far been waived that demand and notice of intent to cancel were required to effect a forfeiture.

57. The said court erred in not finding or adjudging that prior to the cancellation defendant Progressive Evaporator Company, Inc., was given due and proper demand and notice under said license of intention to forfeit the same for nonpayment of royalties.

58. The said court erred in not finding and adjudging that at all times prior to the cancellation of said license plaintiff Norman Lombard was in

actual control of defendant Progressive Evaporator Company, Inc., and all of its assets.

59. The said court erred in not finding and adjudging that plaintiff Norman Lombard because of his said control of defendant Progressive Evaporator Company, Inc., could have prevented forfeiture of said license and is therefore estopped from seeking to set aside such forfeiture in this suit. [340]

60. The said court erred in not finding and adjudging that with full knowledge and consent of defendant Progressive Evaporator Company, Inc., defendants Rees and Hine and Rees Blow Pipe Manufacturing Company, Inc., kept and presented separate accounts of the royalties and payments for machines respectively due them from said Progressive Evaporator Company, Inc., and applied all payment received from it accordingly.

61. The said court erred in not adjudging and decreeing that progressive Evaporator Company, Inc., prior to the cancellation of said license had failed to pay to Rees and Hine, licensors, the royalties payable under said license.

62. The said court erred in not adjudging and decreeing that plaintiffs are estopped from proving or recovering anything in this suit on the theory of a waiver of the royalty requirement of said license agreement in view of plaintiffs' pleadings alleging performance of said agreement.

In order that the foregoing assignment of errors may be and appear of record, the said defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive

Evaporator Company, Inc., present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws of the United States.

Wherefore said defendants pray that said decree may be reversed and that said District Court of the United States in and for the Southern Division of the Northern District of California, be directed to enter a decree dismissing the bill of complaint herein, with costs to said defendants.

All of which is respectfully submitted.

WM. K. WHITE,

CHAS. M. FRYER,

Solicitors and Counsel for Said Defendants.

[Endorsed] Filed Jan. 11, 1927. [341]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL OF DEFENDANTS CLAUDE REES, CHARLES F. HINE, REES BLOW PIPE MANUFACTURING COMPANY, INC., AND PROGRESSIVE EVAPORATOR COMPANY, INC.

In the above-entitled cause defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., a corporation, and Progressive Evaporator Company, Inc., a corporation having filed their petition for an order allowing an appeal together with an assignment of errors and it appearing that the remaining defendants named

in the decree appealed from, to wit: M. A. Neal and Edward B. Ward, individually and as copartners doing business under the firm name and style of Progressive Dehydrater Company, Inc., have failed and refused to join in said appeal.

Now, therefore, upon motion of William K. White and Charles M. Fryer, solicitors for said defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., a corporation, and Progressive Evaporator Company, Inc., a corporation, it is ORDERED that the said appeal be and the same is hereby allowed to said last-named defendants to the United States Circuit Court of Appeals for the Ninth Circuit from the decree for an injunction and accounting made and entered in the above-entitled suit on the 13th day of December, 1926, and that the amount of defendants' cost bond on said appeal be and the same is hereby fixed at the sum of Three Hundred Dollars (\$300.00) and that the accounting ordered in and by said decree entered herein be and the same is hereby suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals.

It is further ordered that upon the giving of such cost bond, a certified transcript of the records and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

Dated: January 11th, 1927.

FRANK H. KERRIGAN,

Judge.

[Endorsed]: Filed Jan. 11, 1927. [342]

(Title of Court and Cause.)

BOND ON APPEAL OF DEFENDANTS
CLAUDE REES, CHARLES F. HINE,
REES BLOW PIPE MANUFACTURING
COMPANY, INC., AND PROGRESSIVE
EVAPORATOR COMPANY, INC.

KNOW ALL MEN BY THESE PRESENTS:
That Maryland Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly licensed to transact a suretyship business in the State of California, is held and firmly bound in the penal sum of Three Hundred Dollars (\$300.00) to be paid to Norman Lombard, Montgomery Flynn, Wm. T. Eckhoff, Norman Lombard and Ellen Lombard, Trustees for Ellen Lombard, Elizabeth Lombard and Norman Lombard, Junior, their heirs, executors, successors or assigns, for which payment well and truly to be made, the undersigned binds itself, its successors and assigns firmly by these presents.

The condition of the foregoing bond is such that

WHEREAS the above-named defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made and entered on the 13th day of December, 1926, by the United States District Court in and for the Southern Division of

the Northern District of California, Third Division in the above-entitled suit.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., shall prosecute their said appeal [343] to effect and shall answer all damages and costs if they shall fail to make their plea good then this obligation shall be void, otherwise to remain in full force and effect; and said Maryland Casualty Company hereby agrees that in case of a breach of any condition of this bond the above-entitled court may, upon notice to said company of not less than ten days proceed summarily in the above-entitled cause to ascertain the amount which said company is bound to pay on account of such breach and render judgment therefor against it and award execution therefor.

Dated at San Francisco, California, January 11th, 1927.

MARYLAND CASUALTY COMPANY,
[Seal] By W. G. KELSO,
Its Attorney-in-fact.

Approved January 11th, 1927.

FRANK H. KERRIGAN,
Judge.

(CERTIFICATE ATTACHED TO FOREGOING BOND.)

State of California,
City and County of San Francisco,—ss.

On this 11th day of January, in the year one thousand nine hundred and 27 before me, Catherine E. Keith, a notary public in and for the city and county of San Francisco, personally appeared W. G. Kelso, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco the day and year in this certificate first above written.

[Seal] CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jan. 11, 1927. [344]

(Title of Court and Cause.)

STIPULATION RESPECTING FORM OF
RECORD ON APPEAL.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that

the transcript on appeal in said cause shall include and contain the entire testimony in the exact words of the witnesses, evidence and proofs taken, made, adduced or introduced at and during the trial and final hearing in said cause.

It is further stipulated and agreed that none of the original exhibits offered or received in evidence in said cause shall be reproduced in said record on appeal and that all of said original exhibits be withdrawn from the files of the above-entitled court and of the Clerk thereof and by said Clerk transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a part of said record on appeal, the said original exhibits to be returned to the files of the above-entitled court upon the determination of said appeal by said Circuit Court of Appeals.

Dated: January 14th, 1927.

KEYES & ERSKINE,

E. C.,

Solicitors and Counsel for Plaintiffs.

WM. K. WHITE,

CHAS. M. FRYER,

Solicitors and Counsel for Defendants Claude Rees,
Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc.

It is so ordered.

FRANK H. KERRIGAN,

Judge.

[Endorsed]: Filed January 17th, 1927. [345]

(Title of Court and Cause.)

PRAECIPE OF DEFENDANTS CLAUDE REES, CHARLES F. HINE, REES BLOW PIPE MANUFACTURING COMPANY, INC., AND PROGRESSIVE EVAPORATOR COMPANY, INC.

To the Clerk of the Above-entitled Court:

Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above-entitled cause.

1. Bill of complaint.
2. *Subpoena ad respondendum* issued August 8, 1923, together with the Marshal's return thereon.
3. Answer of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc.
4. Order dated July 20, 1926, taking bill *pro confesso* against certain defendants.
5. Reporter's transcript of proceedings on motion to dismiss made in open court July 26, 1926, on behalf of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc.
6. Opinion of Judge Bourquin filed November 22, 1926.
7. Interlocutory decree filed December 13, 1926.
8. Stipulation for amendment of interlocutory decree filed December 30, 1926.

9. Order recommending interlocutory decree filed December 30, 1926.

10. Notice to join in appeal and affidavit of service filed January 8, 1927. [346]

11. Petition of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., for order allowing appeal filed January 11, 1927.

12. Assignment of errors of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., filed January 11, 1927.

13. Order allowing appeal of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., filed January 11, 1927.

14. Bond of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., filed January 11, 1927.

15. Citation on appeal of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., filed January 11, 1927.

16. Praeceptum of defendants Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., and Progressive Evaporator Company, Inc., on appeal of said defendants.

17. The entire testimony in the exact words of the witnesses, evidence and proofs taken, made, adduced and introduced at and during the trial and final hearing in said cause.

ceived in evidence at and during the trial and final hearing in said cause.

19. Stipulation and order as to the form of record on appeal and with respect to the withdrawal of exhibits for use on said appeal filed January 15, 1927.

WM. K. WHITE,
CHAS. M. FRYER,

Solicitors and Counsel for Defendants Claude Rees,
Charles F. Hine, Rees Blow Pipe Manufacturing
Company, Inc., and Progressive Evaporator
Company, Inc.

Receipt of the within praecipe admitted this —
day of January, A. D. 1927.

KEYES and ERSKINE,
For Plaintiffs.

[Endorsed]: Filed January 21st, 1927 [347]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred forty-seven (347) pages, numbered from 1 to 347 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that

gressive Evaporator Company, Inc., are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California this 11th day of January, A. D. 1927.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of a copy of the within citation on appeal this 11th day of January, 1927, is hereby acknowledged.

KEYES & ERSKINE,
Solicitors and Counsel for Appellees.

[Endorsed]: Filed Jan. 11, 1927. [349]

[Endorsed]: No. 5051. United States Circuit Court of Appeals for the Ninth Circuit. Claude Rees, Charles F. Hine, Rees Blow Pipe Manufacturing Company, Inc., a Corporation, and Progressive Evaporator Company, Inc., a Corporation, Appellants, vs. Norman Lombard, Montgomery Flynn, William T. Eckhoff, Norman Lombard and Ellen Lombard, Trustees for Ellen Lombard, Elizabeth Lombard and Norman Lombard, Junior, Appellees.

Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed February 11, 1927.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



No. 5051

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

5

CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),

Defendants-Appellants,

vs.

NORMAN LOMBARD, MONTGOMERY FLYNN, WIL-
LIAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lom-
bard, Elizabeth Lombard and Norman
Lombard, Junior,

Plaintiffs-Appellees.

BRIEF FOR PLAINTIFFS-APPELLEES.

ALEXANDER D. KEYES,

HERBERT W. ERSKINE,

MORSE ERSKINE,

Humboldt Bank Building, San Francisco,

Attorneys for Plaintiffs-Appellees.

FILED

MAY 27 1927



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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),

Defendants-Appellants,

VS.

NORMAN LOMBARD, MONTGOMERY FLYNN, WIL-
LIAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lom-
bard, Elizabeth Lombard and Norman
Lombard, Junior,

Plaintiffs-Appellees.

BRIEF FOR PLAINTIFFS-APPELLEES.

NATURE OF THE CASE.

This is an action in equity by one of the stockholders of a corporation (the Progressive Evaporator Co., Inc.) to set aside a transaction by which two of the directors of this corporation, one of whom was the secretary and treasurer thereof, entered into an agreement with the president of the corporation when the three of them constituted a majority of the directors of the corporation to take away the corporation's main

device) and give it to the president.

The proof in this action established one of the most flagrant cases of the violation by corporate officers and directors of their trust that we have ever had come to our notice. Counsel for appellants naively expresses surprise at the decision. In view of the flagrant breach of trust on the part of defendants established by the evidence if the decision had been against the plaintiffs our surprise would not have been naive but indignant. The evidence conclusively established that the defendants constituting the officers and a majority of the directors of the corporation deliberately used their control thereof to take from the corporation its principal asset, to wit, the license agreement, and to give it to one of their number, Neal, the president of the corporation, for their mutual profit and advantage. It is inconceivable how any court of equity under these circumstances could have rendered any other judgment except the one given.

The Progressive Evaporator Company is a corporation organized for the purpose of manufacturing and selling a device for the dehydrating of fruit. Its board of directors consists of one of the plaintiffs, Norman Lombard, and the defendants Malcolm A. Neal, Claude Rees, Charles F. Hine and Loring Powell. Prior to November 1, 1922, Lombard was the president and Powell the secretary of this company, which we will hereafter refer to as "the corporation". This corporation's most valuable asset was an exclusive license to manufacture and sell a device for dehydrating fruit

and vegetables (R. 142). This device was embraced in certain applications for patents described in the license agreement (R. 37). This license agreement was given to the corporation by Rees and Hine, the inventors and applicants for the patents, whom as we have shown were two of its directors. This agreement was dated February 10, 1922. On April 18, 1922, application Serial No. 351,538 was granted and letters patent were issued to the Rees Blowpipe Mfg. Co., as the assignee and grantee of the inventors, Claude Rees and Charles F. Hine (see Plaintiffs' Exhibit 4, R. 180). *In October, 1922, Neal, Rees and Hine, three out of five of the directors of said corporation, because of a quarrel with Lombard planned to take control of the corporation to the exclusion of Lombard and Powell and to take its license agreement away and terminate its business* (see Neal testimony, R. 254-256-390. Testimony of Hine, R. 198-200). In pursuance of this plan on November 1, 1922. they ousted Lombard and Powell as president and secretary, respectively, of the corporation and elected Neal and Hine president and secretary thereof. They then took complete control of the affairs of the corporation. They then proceeded to alter its books and records, and the books and records of the Rees Blowpipe Mfg. Co., to make it appear that the royalties due to Rees, Hine and the Rees Blowpipe Mfg. Co. under the license agreement had not been paid or secured when in truth and in fact they had been both paid and secured. [(See testimony of Powell, R. 285-287.) (Powell employed to change entries in corporation's books, see testimony of Rees, R. 246, pages of royalty account book showing

destroyed, see also the royalty account book which is with the exhibits.) Also compare statements of September 5, 1922, defendants' exhibit C rendered by Rees Blowpipe Co. previous to quarrel, with its ledger account with corporation, as written after quarrel, plaintiffs' exhibit 7.] They then put a complete stop to the business of the corporation and ceased advertising, soliciting sales or doing any business whatsoever except the business of liquidating its affairs (R. 138); see Hine's testimony (R. 202), where he says:

“Q. And, as far as the Progressive Evaporator Company is concerned, after November 1st, when you became secretary, no orders were taken?

A. No.

Q. And no sales were made?

A. No.”

See testimony of Neal (R. 260):

“Q. After the row started on October 27, was any attempt made thereafter by you to carry on business for the corporation?

A. None.”

On January 13, 1923, Rees and Hine served Neal, who was acting in collusion with them, with a notice of the cancellation of the license agreement and shortly thereafter and in pursuance of their plan to take the license agreement away from the corporation they gave a new license agreement to Neal, the president of the corporation (Neal's testimony, R. 254-256; Hine's testimony, R. 198 and 218). There never was a more flagrant instance of corporate officers and directors violating their trust than the one just related. The license which they gave to Neal was similar in

terms and embraced the identical patents and applications for patents and inventions covered thereby that the license held by the corporation covered.

The corporation not only held the license agreement (R. 217-218), but it also had an agreement with the Rees Blowpipe Co., dated April 17, 1922, which we will hereafter call the manufacturing agreement (see p. 64, minute book of corporation, which is an exhibit). By this agreement the Rees Blowpipe Mfg. Co. was to manufacture for certain payments the devices embraced within the license agreement when ordered by the corporation. Not only did the defendants give a new license to Neal after their attempted cancellation of the corporation's license, which license was exactly like the license held by the corporation and embraced the same devices, but the Rees Blowpipe Mfg. Co. gave to Neal an agreement to manufacture these same devices, identical in terms with the manufacturing agreement it had made with the corporation. This was all done in pursuance of the plan of these directors in control of the corporation to take its license and business away from it and turn its license and business over to the president of the corporation with whom they were acting in collusion. As soon as the new license agreement was given Neal and the new manufacturing agreement made with him and one Ward, who was his partner, doing business as the Progressive Dehydrator Co. (R. 254), *the list of customers and all of the prospects for business which the corporation had secured at great labor, expense and trouble were taken by Hine and Neal and were used by Neal to sell these patented devices under his new*

fifty of them for a gross return of about \$300,000.00 (R. 203-5-141). *The facts stated in this paragraph should be borne in mind when it comes to determining whether or not the record shows any evidence of manufacture and sale of these devices by the defendants.* In view of these facts the claim that there was no showing made that the defendants had manufactured and sold the patented device is ridiculous. They took the license agreement away from the corporation, gave it to Neal, made an agreement with him to manufacture for him, gave him the list of prospective customers for these devices and he went out and admittedly sold them 50 of these devices and yet it is claimed in the most naive way that there was no evidence that these devices were manufactured and sold.

Counsel for defendants were not the attorneys for the defendants in the trial court and have evidently misapprehended the real gist of this action and the real issue in the case. *It was conceded by defendants at the trial and in their pleadings that they were manufacturing and selling the patented device referred to in the patent and in the license agreement but it was claimed by defendants that this manufacture and sale did not constitute an infringement of any right of the corporation because the rights of the corporation in the patented device created by the license had been taken away by the cancellation of this license.* The plaintiff claimed that the attempted cancellation was void and that defendant had no right to cancel the license. This was the real issue in the case. This was the matter in controversy. *It was*

not admitted that the patented devices were manufactured and sold by the defendants at the time of the commencement of the action. It was conceded that this was being done. It was claimed, however, that this was not an infringement of any right of the corporation. It was claimed that the corporation had forfeited all of its rights to make and sell these patented devices and that therefore the manufacture and sale of them by the defendants was no infringement. It was on this theory and on this issue that the case was tried. This the record clearly shows.

The defendants were the officers and controlling directors of the corporation. They used their control in violation of their duties as directors and officers for the purpose of taking the corporation's main asset, this license agreement, from it, and giving it to the president of the corporation, and for the purpose of preventing the corporation from resisting the cancellation of the license and continuing with the manufacture and sale of the patented devices under this license agreement. They used their control of the corporation not only to cancel its license and prevent it from resisting this cancellation but to prevent its continuance of business and to put it out of business. As these directors were in control of the corporation and the corporation therefore was under a disability and unable to bring an action to right these wrongs being done it the right arises for a stockholder to commence an action in its behalf and to bring what is usually termed a stockholder's bill brought for the benefit of the corporation by a stockholder because the

case could not bring the action.

Witten v. Dabney, 171 Cal. 621;

Federal Equity Rule, 27;

Fox v. Hale & Norcross, 108 Cal. 475, 477;

Graham v. Dubuque Mach. Co., 114 N. W. 619;

3 *Pomeroy Equity Juris.* 1095.

The acts of the defendants gave rise to a cause of action in favor of the plaintiffs, *stockholders of the said corporation, and against the defendants, irrespective of the question whether or not there was an infringement of a patent right.* The license agreement gave the corporation certain rights; these rights the defendants as officers and directors thereof were bound to protect. Instead of protecting these rights they violated them. The corporation at the instance of a stockholder was entitled to protection against such violation whether or not the violation involved the patent right and irrespective of whether the right violated was patentable or whether or not letters of patent covered the right violated. It happens that the right secured to the corporation by this license was embraced within a patent. It happens that the patentees are Rees and Hine, two of the defendants and two of the officers of the corporation violating its rights. It happens therefore that the patentees are the infringers and accordingly the licensee, to wit, the corporation, or the plaintiff, a stockholder thereof, acting for it can bring an action for infringement.

See:

Littlefield v. Perry, 21 Wall. pp. 205, 221;

Waterman v. Mackenzie, 138 U. S. 255;

In the case of *Littlefield v. Perry*, the court said (p. 223):

“A mere licensee cannot sue strangers who infringe. In such case redress is obtained through or in the name of the patentee or his assignee: *Here, however, the patentee is the infringer, and as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name.* A court of equity looks to substance rather than form. When it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer. He held the legal title to his patent in trust for his licensees. He has been faithless to his trust, and courts of equity are always open for the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction.”

So we see that defendants' violation of the license agreement which as officers of the corporation they should have protected could be prevented in a court of equity irrespective of any infringement of a patent and that the infringement of the patent is only incidentally involved but does give this court jurisdiction. Counsel for defendants has evidently overlooked this feature of this case. He is endeavoring to treat this action as the ordinary case of infringement of a patent when it involves only incidentally the infringement of a patent, and in the main is an action to prevent the

themselves its valuable asset.

The main contention of defendants on appeal is that no infringement has been shown. There are three complete answers to this contention. They are the following:

1st. The manufacture and sale of the devices covered by the patent and by the license agreement *are admitted by the answer and are not denied specifically or at all by the answer.*

2nd. The case was tried on the theory stated by counsel for defendant at the beginning of the trial, *THAT THE MANUFACTURE AND SALE of the patented devices by the defendants was ~~conceded~~^{conceded} and that the Sole Issue was whether or not the defendants had the right to cancel the right they had given the corporation to make these devices.*

3rd. Assuming that the manufacture and sale of the patented devices by the defendants at the time of the commencement of the action are not admitted by the answer and were not conceded at the trial, *there is ample evidence in the record to support the court's decision that there had been such a manufacture and sale.* The evidence in the record establishes unequivocally the manufacture and sale of these devices by defendants at the time of the commencement of the action.

We will discuss these propositions in the order stated.

First: *The pleadings admit the manufacture and sale of the patented devices.* As we have stated, the position of the defendants from the inception of this action, through the trial of this case and until they changed lawyers and took an appeal from the decision of the lower court, was that the defendants had the right to cancel the license and to make and sell the patented devices. It was claimed by them that this manufacture and sale did not constitute an infringement because the corporation by the cancellation of the license had lost all interest in the patented devices and all right to make and sell the same. *The position of the defendants in this respect is reflected in their pleadings.* Their answer does not specifically deny infringement as counsel repeatedly claims. They admit the manufacture and sale of the patented device but deny that this constituted an infringement. They deny that they manufactured or sold *in violation or infringement of any rights of the plaintiffs* (R. 78). By this form of pleading they admit that they have manufactured and sold and claim that they have the right to do so in disregard of the corporation's claims. Their pleadings in this respect are in line with and in strict accordance with the position that they adopted at the trial and have always adopted until their change of attorneys on appeal, to wit, that they had the right to manufacture and sell the patented devices covered by the patent in complete disregard of the corporation because it had lost all rights held by it under the license. In order to make this clear let us examine the pleadings. The allegation in the

lation and infringement of the patent is as follows (R. 22):

“In violation and infringement of the patent rights and of the letters patent covered by said license agreement in which the said corporation has an interest by virtue of said license agreement the said Rees and Hine and the Rees Blowpipe Mfg. Co., and the defendants Neal and Ward individually and as co-partners have manufactured and sold and are now manufacturing and selling the said patented devices.”

The answer of the defendants to this allegation is contained on page 78 of record, and is as follows:

*“These defendants deny that thereafter * * * in violation and/or infringement of the patent rights and/or of the letters patent covered by said license agreement said Rees and Hine and/or Rees Blowpipe Manufacturing (67) Company, Inc., and/or said defendants, Neal and Ward, individually and/or as copartners have manufactured and/or sold and/or are now manufacturing or selling said patented devices.”*

A reading of these allegations will show that defendants *do not deny that they are manufacturing and selling the devices.* They deny that they are manufacturing or selling them *in violation or infringement of the corporation's rights but they do not deny that they are manufacturing and selling them.* There is not an unequivocal denial in their answer that they are manufacturing and selling these devices. On the contrary their answer admits the manufacture and sale, but denies that such manufacture and sale is a violation or infringement of their contract. This sort of a denial has been held to constitute an admission

of the manufacture and sale and of an infringement if the validity of the patent rights are established.

The infringement of a patent is the unauthorized making, using or selling of the invention during the life of the patent. The infringement may consist in their making, using or selling the invention or in all three. See 30 *Cyc.* pp. 971 and 972, where it is said:

“INFRINGEMENT. WHAT CONSTITUTES. IN GENERAL. The infringement of a patent is the unauthorized making, using, or selling of the invention during the life of the patent. * * * Infringement may consist either in making, using, or selling the invention, or in all three.”

Infringement is the legal effect of making, using or selling an invention. The making, using or selling is the fact to be pleaded. The infringement is the conclusion. An allegation of infringement by manufacture and sale should be answered *distinctly and unequivocally*. If the defendant does not deny the manufacture or sale the fact of infringement is admitted.

30 *Cyc.* 1035;

Globe Nail Co. v. Superior Nail Co., 27 Fed. 454;

Goodyear v. Day, Case #5566, 10 Fed. Cases 677;

Ely v. Monson & B. Mfg. Co., 8 Fed. Cases #4431, see first column, p. 605;

Jordan v. Wallace, 13 Fed. Cases p. 1104, Case #7523.

The last two above quoted cases and particularly the last one are directly in point. In the last case the court says:

respondents are therefore bound to answer it *distinctly and unequivocally*. In their original answers, their response to this allegation is qualified and equivocal. They do not deny the use of the invention described in the patent, but only that it was used 'with a full knowledge of the premises mentioned in said bill of complaint, *and in violation of the complainant's exclusive rights secured by the patent of 1864*'. This clearly implies an admission of its actual use. * * * Thus, not only failing to deny their alleged use of the complainant's invention, which he has a right to treat as a confession of its use, *but, by their mode of answering, impliedly admitting it, the complainant is not required to make any further proof of infringement.*"

Attention is called to the fact that in the last mentioned case the denial of the defendants was practically the same as the denial in the case at bar. The defendants there denied that they were using the patented invention "in violation of the complainant's exclusive rights". In the case at bar they deny that they are manufacturing and selling *in violation of the corporation's rights*. In the case of *Jordan v. Wallace*, supra, it was held that this constituted an admission of the actual use of the patented device. Similarly in the present case the denial that they are manufacturing or selling patented devices in violation of the corporation's rights is an admission of the actual manufacture and sale of such devices. By this mode of answering, as the court says in the last mentioned decision, impliedly admitting the manufacture and sale of the device, the complainant was not required to make any further proof of the infringement. It cannot be claimed that this form of denial was a mere

mistake in the pleadings. It was intentional. It was in strict accordance with the theory and position adopted by the defendants before and throughout the trial which was that they had an absolute right to manufacture and sell these devices and to ignore the corporation because they had cancelled the license which they had given it.

THE CASE WAS TRIED ON THE THEORY THAT THE MANUFACTURE AND SALE BY THE DEFENDANTS OF THE PATENTED DEVICE WAS CONCEDED.

Second: This brings us to the second proposition above stated, to wit: The case was tried on the theory that the manufacture and sale of the patented devices was conceded and the sole issue was whether or not the defendants had the right to cancel the license held by the corporation. At the inception of the trial and after the opening statement of counsel for the plaintiffs the judge requested the defendants' counsel to make a statement. The court said (R. 120):

“MR. BARRY. Does your honor wish any statement from the defense?”

The COURT. *You can make it if you want to. I think perhaps you had better. We want to know what the issue is that we have to try here.*”

Counsel then made a very full statement of what he expected to prove. In this statement he never at any time denied the manufacture and sale of the patented device and never by the remotest suggestion raised the question now raised by other attorneys on appeal. On the contrary at the conclusion of his opening statement counsel for the defendants stated that *the*

defendants had the right to cancel the license agreement. Counsel's statement in this respect is as follows (R. 124):

“So that the real issue in controversy here is, first, were the royalties paid, and, second, were the royalties paid at the time that the notice of cancellation was given? It is the contention of the defendants that those royalties were not only not paid then, but that no royalty at any time had ever been paid from the time that they became due in April, 1922, up to the time that notice was given (109).”

The right of the defendants to cancel this license agreement and take it away from the corporation and give it to the president depended upon whether the royalties had been paid or the payment thereof secured or waived. This, counsel for plaintiffs stated, *was the real issue in controversy* and thereupon the case was tried upon that theory. This statement and the entire proceedings of the defendants at the trial conclusively show that it was conceded that the defendants were manufacturing and selling the devices but it was claimed that they had a complete right to do so and were violating no rights of the corporation in doing so. One cannot try a case upon one theory in the lower court and then seek to have it reversed in the upper court on another and different theory. Having taken one position and founded their defense on one issue in the lower court and having stated to the court that that was *the real issue in the case*, they cannot now, when the decision has gone against them, turn around and claim that there was some other issue totally distinct upon which proof was not ad-

duced. They are estopped from so doing. To allow them to do so would be to allow them to mislead the court and opponents and to later take advantage of their deception on appeal.

Counsel not only in his opening statement and throughout the trial adopted the position that there was only *one real issue in controversy* and that that was the right of the defendants to cancel the license, but in his motion to dismiss made at the conclusion of the trial, in particularizing in what respects the plaintiff had failed to establish the allegations of his complaint, *he does not by a single word claim that it had not been established that there had been any manufacture and sale of these devices.*

Furthermore, throughout the trial the court kept stating that the sole question was whether or not the defendants had the right to take the license away from the corporation. For instance:

“The COURT. * * * *The only question is whether these defendants have wronged the corporation. If he brings in testimony enough to show that the corporation has been wronged, he will be entitled to relief, regardless of his good or bad faith. So far as his honesty is concerned, some things may be shown. I think it will come up in your case, if at all*” (R. 173).

“He (Lombard) warned them that they must look out for the interest of the corporation.

The COURT. *The question is did they or did they not look out for it? It would not make any difference whether they got a warning, or not*” (R. 177).

“The COURT. What is the difference what Lombard was afraid of? *If you show that these people were at fault, you will get your decree, whether Lombard was afraid of them, or whether*

Not once in reply to these statements of the court or at all did counsel for defendants claim there was any other issue involved. Not once did he state or claim that there had been no manufacture and sale of these evaporators. He advised the court at the beginning of the trial that there was one *real issue* involved, to wit, defendants' right to cancel the license. He presented his case on the theory that that was the only issue involved. He never advised the court that he claimed there was any other point in issue. He conceded that defendants were manufacturing and selling evaporators but claimed they had the right to do so as the corporation had lost its exclusive license.

It is a well established rule that when a case is tried on one theory, a new and different theory cannot be adopted on appeal. See 3 *C. J.* 718, where it is said:

“One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review. *And the same is true where the parties act upon a particular theory of defense.*”

See *New York etc. Co. v. Estill*, 13 Supreme Ct. 444, where it is said in the fourth syllabus:

“Where both parties at the trial have accepted the value of the cattle at their ultimate destination as the basis upon which the damages are to be computed, defendant cannot contend on appeal that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road.”

See:

Bassett v. Erickson Const. Co., 213 Fed. 810.

The last mentioned case was tried in the lower court on the theory that an issue of infringement was raised by the pleading. It was held by the upper court that appellant could not claim on appeal that an infringement was admitted by the pleading. Likewise in the case at bar defendants having tried the case on the theory that the manufacture and sale was admitted but that it was not in violation or infringement of the corporation's right because it had no rights to violate, they cannot now adopt the theory that there was not a manufacture or sale by them of the patented devices. See *Lesser Cotton Co. v. St. Louis etc. Ry. Co.*, 114 Fed. 133, where the court says, page 142:

“It is evident that both parties tried the case on the theory that, if the fire was set on the roof of the barn, the defendant might be liable for it, while, if it was set within the barn, it was exempt from responsibility. The court charged the jury in accordance with this theory, and it undoubtedly made the remark that, if the fire started inside the barn, it could not have been set by sparks from the locomotive, because it was imbued with the contentions of the parties that the defendant was liable for the fire if set on the outside, and that it was not responsible for the fire if set on the inside of the barn. *It is too late for*

theory, to challenge in the appellate court the ground upon which they sought a recovery, and to insist that the defendant was liable for a fire set within the barn, because in the trial of the real issue which they presented some testimony crept into the record, upon which they asked no instruction, and to which they do not seem to have called the attention of the court at the trial, which might have warranted a recovery on account of a fire set within the barn. One may not try a case upon one theory, and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below."

See also:

Thomas v. Taylor, 32 Supreme Ct. 403, see p. 405; 224 U. S. 73;

Mesa Market Co. v. Crosby, 174 Fed. 96.

If there had been no manufacture and sale of these devices by defendants then there would have been no necessity for going into the question of defendants' right to cancel the corporation's license. The question of the validity of the cancellation only arose and became material when the manufacture and sale was admitted or conceded. When counsel told the court that the *only real issue was* the validity of the cancellation he conceded that the manufacture and sale had not been denied and that the question was not in issue. He made this concession at the outset and he tried his *case on that theory*. Under all the *canons* of fair dealing and under the rule set forth in the above quoted cases he cannot now change his position and adopt a new and different theory of defense.

MANUFACTURE AND SALE BY DEFENDANTS OF THE PATENTED DEVICES CONCLUSIVELY ESTABLISHED BY THE EVIDENCE.

Third. We now come to our third proposition. There is ample evidence in the record, uncontradicted and uncontroverted, establishing the fact that defendants were at the time of the commencement of the action and thereafter manufacturing and selling the patented devices, embraced within the license agreement held by the corporation. In view of the evidence it is hard for us to see how counsel has the temerity to claim that there is no proof of manufacture and sale of the patented devices by defendants. *Conceding the authorities cited by them hold all they claim they hold the evidence of manufacture and sale fulfills every requirement they claim it should fulfill.* Let us examine the record in this respect.

The issuance of the patent was alleged in the complaint (R. 5). A copy of the letters patent was attached to the complaint marked "Exhibit A" (R. 6-28-35). The issuance, genuineness and validity of this patent and of the letters patent *were not denied by the answer but were admitted.* It was not necessary therefore to introduce the letters patent in evidence as counsel seems to imply, they were already in evidence by virtue of these allegations and admissions. The letters patent were introduced in evidence however and were considered admitted by the pleadings (R. 180, Plaintiffs' Exhibit 4).

The license agreement with the corporation was made on February 10, 1922 (R. 36). It covered applications for U. S. patents No. 351,538, No. 429,298

No. 351,538 was granted in April, 1922 and U. S. letters patent No. 1,413,135 issued on this application (R. 5, 28, 30, 180). Contemporaneously with the issuance of this patent, Rees Blowpipe Mfg. Co. entered into a written agreement with the corporation to manufacture for it at certain prices the *evaporators* containing the inventions embraced in these letters patent and pending applications covered by the license agreement (see p. 64, minutes of directors of corporation, R. 138). This we will call the manufacturing agreement.

The devices containing these inventions were called *plants and evaporators*. Under the license and manufacturing agreement the corporation was the selling company and the Rees Blowpipe Co., was the manufacturing company (R. 139):

“Mr. ERSKINE (Lombard’s testimony): Q. You proceeded to manufacture plants, did you not?

A. We were the selling organization. The Rees Blowpipe Manufacturing Company was the manufacturing concern.

Q. You gave them orders to manufacture plants?

A. Yes.

Q. And they manufactured plants, did they not?

A. Yes.”

During the year 1922 the corporation made sales of 24 of these plants or evaporators (R. 128). Now when the three directors attempted to take away the license agreement of the corporation what did they do? They gave Neal and Ward, as the Progressive

Dehydrator Co., a license agreement exactly like the one the corporation had (see allegation in complaint, not denied by answer, R. 21-22; see also R. 254-55, R. 218). This license agreement purported to give Neal and Ward the right to *make and sell the patented device* embraced within the license given to and held by the corporation. Contemporaneously with the making of this new license agreement, Rees Blow Pipe Co., made an agreement with Neal and Ward, as the Progressive Dehydrator Co., to manufacture for them these plants embracing this patented device. This manufacturing agreement was exactly like the manufacturing agreement between the corporation and the Rees Blowpipe Co. (see allegation of complaint undenied by answer, R. 22; see admission of defendants' counsel, R. 217-218):

“MR. ERSKINE. And it (referring to this new manufacturing agreement) is practically the same as the other?”

MR. BARRY. Yes.”

Thus far what does the evidence show? It shows the defendants giving to Neal and Ward a license to make and sell these so-called plants or evaporators containing this patented device and it shows the Rees Blowpipe Co., agreeing in writing to manufacture these plants or evaporators for Neal and Ward, describing them by the patent number. In other words the evidence established by documentary proof that the defendants contracted to manufacture and sell the identical device described in the letters patent and in the applications for letters patent referred to in the license agreement held by the corporation and their

referred specifically to the patent by its patent number and application number. These agreements in themselves identify the device to be manufactured and sold by Neal, and Ward as the same one embraced in the corporation's license agreement. These agreements and this evidence show conclusively that Neal and Ward were going to sell the same plant or evaporators theretofore made and sold by the corporation, under its license and patent rights.

Now what did Neal and Ward as the Progressive Dehydrator Company do? Did they sell any of these plant or evaporators described in their license and manufacturing agreements by exactly the same terms as the patented devices were described in the license and manufacturing agreements with the corporation? Does the evidence show they made and sold any such plants and evaporators which they had agreed to make and sell? *The evidence without conflict shows such manufacturing and selling.*

As soon as the new license and manufacturing agreement was made with the said Neal and Ward, as the Progressive Dehydrator Co., Neal and Hine took the list of prospective customers for plants of the corporation and proceeded to take orders from these customers. See Hine's testimony, R. 202, 203, 204:

“MR. ERSKINE. In the meantime, Mr. Hine, after this cancellation notice was given, were any orders taken by the Progressive Evaporator Company which you were the secretary or for the manufacture of any plants?

A. No sir.

Q. *But orders were taken by the Progressive Dehydrator Company (171) thereafter, were they not?*

A. *They took some after that time.*

Q. *They took some the following year, didn't they?*

A. *Yes. * * **

Q. *During the existence of the Progressive Evaporator Company's activities, and prior to the cessation of activities around November 1st, they had secured certain prospects and lists of prospects, had they not?*

A. *I cannot tell you. * * **

Q. *Those prospects were taken, were they not?*

A. *Yes.*

Q. *And they were afterwards turned over to Mr. Neal, were they not?*

A. *No, sir.*

Q. *He used them, didn't he?*

A. *No, sir (172).*

Q. *And sales were made to those prospects?*

A. *Yes.*

Q. *They were?*

A. *Yes, because he went out in the field and worked among those people. * * **

Q. *But as president of the company he (Neal) knew about them, did he not?*

A. *Absolutely.*

Q. *And he made sales to them?*

A. *Yes.*

Q. *And the result was that you sold 50 evaporators during the following year?*

A. *I think Mr. Neal and Mr. Ward did, yes."*
(R. 204.)

Here we have one of the defendants admitting that they manufactured and sold to prospective customers of the corporation, the list of whose names they had filched from its files 50 evaporators or plants. Here we have a clear unequivocal admission of the manu-

of fifty evaporators, the selling price of which was not less than \$5,000.00 apiece (R. 141). How counsel can have the temerity to assert that there is no proof of manufacture and sale in view of this admission and in view of the fact that these sales were made under agreements which described the patented device by both its patent and application numbers is a mystery to us. There was never clearer proof of manufacture and sale. *There was never clearer proof that the device so manufactured or sold was the device covered by the patent claimed to have been infringed.*

There is further testimony to this same effect. Hine testified (R. 220):

“MR. BARRY. Q. *Do you know how many evaporators were sold in 1923?*

A. About 32, or somewhere along there (186).”

Defendants' own counsel brought this statement out. Neal testifies (R. 254-55) as follows:

“A. We had a general understanding that if this agreement was cancelled that I would have the opportunity to go ahead under a new license agreement, and subsequently took the matter up with Mr. Ward, having met him accidentally in the matter in November, I believe. * * *

Mr. ERSKINE. Q. Who was Mr. Ward?

A. Mr. Ward was my partner in the Progressive Dehydrator Company *during the year 1923, and until about January 26, 1924.*

Q. *And the Progressive Dehydrator Company was the company that got this license after the other one had been cancelled?*

A. Yes sir.”

Here he says the Progressive Dehydrator Company did business in 1923, the year the complaint was filed. Its business was the sale of the evaporators covered by the license given in the place of the one held by the corporation. *These evaporators embraced the patented device.* This itself established sales of the patented device. But Neal goes on and says (R. 260):

“Q. *Was any attempt made by you to get business for the Progressive Dehydrator Company?*

A. *Considerable * * **

Q. *Did you use the prospects which you had from the Progressive Evaporator Company's business to get business?*

A. *Yes, sir.*

Q. And did you tell Mr. Hine and Mr. Rees that you were doing that?

A. Mr. Hine knew it; he had the letters right there on the desk, and I had access to them.

Q. What letters did he have on the desk?

A. Letters from various prospects.

Q. Where did you get the letters?

A. They were the property of the Progressive Evaporator Company for the year previous.

Q. He had them on the desk?

A. In the desk.

Q. And you went and looked at them. Is that the fact?

A. Yes, sir.”

Hine's evidence alone is sufficient to establish the manufacture and sale of these patented devices. Neal's evidence alone is sufficient to establish it but there is more. *Rees and Hine kept a royalty account book of royalties due and collected by them for the use of this patented device.* This royalty account book showed the royalty due and received from the corporation in 1922 and it *showed the royalties due and received from*

pany in 1923 (see royalty A/C book, an exhibit in evidence; see testimony of Crookston, R. 356-57). Neal and Ward were paying a royalty under the new license agreement identical in terms with the one held by the corporation. This royalty covered *the use of this patented device and no other*. This book shows *the payment* of these royalties. The payment of royalties shows the manufacture and sale of the patented device. That is why the royalties were paid. They would not have been paid if there had not been such a manufacture and sale. *The entries in this book alone would establish conclusively if there was no other proof the manufacture and sale at the time of the commencement of this action of this patented device*. Is it any wonder that at the trial in the face of all this counsel conceded that the patented device had been manufactured and sold by defendants but claimed they had the right to do so?

Accordingly it is established without controversy by the evidence that the defendants had contracted to make and sell plants or evaporators embracing the patented device and inventions referred to in the applications for patents. In the contracts to make and sell these plants or evaporators embracing the patented invention the patented invention was described as being part of the plant or evaporator and was described by its patent and application numbers. It was shown without controversy, furthermore, that the defendants not only contracted to make and sell these plants or evaporators by agreements describing the patented devices, contained therein, by its patent

number and application number, but also made actually 50 sales thereof in the year 1923. Counsel states that possibly the court may have assumed that machines were built and sold having the identical construction and mode of operation covered by the patent because of the license agreement given Neal and Ward (see p. 24, Defendants' Brief), and he says that the court had no right to make any such assumption. The court did not need to make any such assumption. Not only the license agreement but also the manufacturing agreement referring to the patented device was in evidence. Furthermore, as we have shown, there was evidence that Neal and Ward operated under these two agreements and sold the patented device therein referred to. *Furthermore, there is evidence that not only did they manufacture and sell these devices under these contracts but they paid a royalty for so doing, the royalty being the royalty due to Rees and Hine under the license agreement for the manufacture and sale of the patented device.* All this appears in the evidence and it makes the proof of manufacture and sale absolute and not dependent upon any inference or assumption. There was not only before the court the proof of the existence of a *license agreement* but *there was the proof of the existence of a manufacturing agreement, of actual sales and of a payment of royalties for the making and selling of the patented device.*

This is not a case where the main issue is whether or not some mechanical contrivance violates or infringes some patented device. Then the principles cited by counsel come into play. Then it is necessary

defendants' brief) "the manufacture and sale of a device embodying the combination of elements defined in the patent in suit and the presence of these elements operating in the alleged infringing device according to the same mode as that of the machine embraced in the patent and accomplishing the same result". But here there was no claim or evidence that another plant or evaporator was made or sold except the one covered by both license and both manufacturing agreements and specifically describing the patent. The same plant or evaporator was contemplated by the terms of all of these agreements. The plant or evaporator was described in the same way and embraced the same United States patent described by its number and the same applications for United States patents described by their numbers. It was shown without controversy that the defendants had contracted to make and sell this patented device, that they had done so and had paid a royalty to the patentees for so doing and all further proof is unnecessary.

It would serve no good purpose and only make for the greater length of this brief to enter into a lengthy analysis of the authorities cited by counsel. We will refer briefly to them.

In the case of *Slessinger v. Buckingham*, 17 Fed. 454, the alleged sale of boots which constituted the claimed infringement was unequivocally denied by the pleadings and not admitted thereby as in the case at bar. The court says:

"There is no *positive* testimony that these boots were made or sold by the defendant at all."

There was only the testimony of one party that he thought that a pair of patented boots had been sold but he did not know it. There was no absolute direct proof of manufacture and sale and payment of royalties on such manufacture and sale as there is in this case. There was no proof whatever of infringement.

So also in the case of *Rumford Chemical Co. v. Egg Baking Powder Co.*, 145 Fed. 953. There is no evidence whatever that the defendants made, used or sold the infringing article and the court said (p. 954):

“In the absence of evidence indicating that the defendant made, used, or sold the infringing article, or attached the label to the can containing the baking powder, or was engaged in its manufacture in the Southern District of New York, I am not inclined to adopt the complainant’s view that a prima facie case of infringement has been established.”

Such a case is clearly distinguishable from the case at bar where the evidence establishes not only an agreement to manufacture and sell the patented device but the sale of fifty of them and the payment of royalties to the patentees on such manufacture and sale. There was no proof in the *Rumford* case. There is overwhelming proof in the case at bar.

The same may be said of *Gray v. Grinberg*, 147 Fed. 732. There the court said, page 733:

“Admittedly, therefore, there is no direct proof of a sale, and the question for decision is whether the evidence fairly justifies the inference that an infringing article was sold in this city.”

There was no direct proof of a sale such as there is in this case and the sole question before the court

inference of such sales. The court there held that there was no evidence to justify such an inference. If there had been proof in that case as there is *here of a contract to manufacture and sell, of sales made in pursuance of that contract and of royalties paid*, then there is no question the court would have found that the evidence justified the inference that there had been a manufacture and sale.

In fact all of the cases cited by defendant are susceptible of the same broad differentiation from the case at bar. In none of them was the making and selling admitted by the pleadings. In none of them was it practically conceded at the trial that defendants were making and selling the patented device under a claim of superior right. And in none of them was there such direct proof that a machine embodying the patent device was being made and sold and royalties paid for so doing. These three propositions are a complete answer to defendants' claim that there is no showing of infringement.

DEFENDANTS CONTEND THAT THE COURT ERRED IN RESTRAINING THE INFRINGEMENT OF A PENDING APPLICATION FOR A PATENT.

In making this claim counsel shows that he has misapprehended the true nature of this action. He considers it an ordinary action for the infringement of a patent right. On the contrary it is an action by the licensee through its stockholders against the licensors and inventors to restrain them from violat-

ing their agreement giving the licensee an exclusive right to the use of these inventions.

Before the granting of a patent an inventor has a qualified property in his invention and may give an exclusive license for the use of such an invention even before it is patented.

30 *Cyc.* 955;

Brush Elec. Co. v. Cal. Electric Light Co., 52 Fed. 945, see p. 963;

Barton v. Burton Stock Car Co., (Mass.) 50 N. E. 1029;

Hendrie v. Sayles, 98 U. S. 549.

In other words an inventor has an inchoate right which he may assign. While the inventor has no exclusive right to the invention until he obtains a patent, and while he cannot enjoin an infringement until he secures a patent, *if he gives an exclusive right by a license agreement to a third party to use that invention then that third party can restrain the inventor himself from violating the right so created by the license agreement.* The right so violated and the right to be protected by the injunction is not the statutory patent right referred to by counsel but is a right created by the license agreement. It is based upon the agreement creating the exclusive license and not upon the patent. It is the right created between the inventor and the exclusive licensee. It is separate and distinct from the patent. Neither the inventor nor the exclusive licensee can restrain others from invasion until the patent is issued because the patent is the basis of their right to restrain others

restrain invasion by the inventor himself. This right is based upon the exclusive license irrespective of whether or not the invention is patented. It is a right arising from the agreement and not by statute. It is independent of any patent. It is analogous to the right to restrain the misuse of trade secrets (32 *Corpus Juris* 156-158). See *Simmons Medicine Co. v. Simmons*, 81 Fed. 163; the syllabus in the latter case says:

“Sale of Right in Secret Compound.—Disclosure by Seller,—Injunction. Equity will not permit one who has sold for a valuable consideration the absolute and exclusive property in a medicine compounded by a secret process to reveal such secret to a third person, either by himself, or through a member of his family, and will restrain by injunction the use of a secret so revealed.”

It is similar to the right to restrain the violation of an agreement preventing the conduct of a business in a certain territory.

See:

32 *Corpus Juris*, 223.

It is in fact the right to restrain the violation of an agreement giving an exclusive privilege. Such a right has always been upheld in equity.

See: 32 *Corpus Juris*, 223, on Injunctions, Sec. 347, where it is said:

“CONTRACTS FOR EXCLUSIVE PRIVILEGES. Injunctions have been granted in many cases where complainant had an exclusive contract right to some privilege, to prevent such privilege from being extended to, and being enjoyed by, others.”

See also:

Alpers v. City and County of S. F., 32 Fed.
503;

*Singer Sewing Machine Co. v. Union Button
Co.*, 22 Fed. Cases p. 220, Case #12,904.

In claiming that the court erred in restraining the defendants from infringing the inventions for which a patent had been applied counsel overlooked the broad equitable principle above referred to and the fact that the inventors are the licensors and the corporation, for whose benefit the action is brought, the exclusive licensee. Counsel failed to note that the defendants are violating an exclusive privilege created by their own contract with the corporation which they may be restrained from violating irrespective of whether or not a patent right is involved. This is a complete answer to defendants' contention that the court erred in restraining the violation of the exclusive right granted by the license.

**IN THE STOCKHOLDERS' ACTION A COURT OF EQUITY HAS
THE POWER TO AWARD THE PLAINTIFF, IF SUCCESSFUL,
A REASONABLE ATTORNEY'S FEE.**

In their contention that the court erred in providing in the decree for a reasonable attorney's fee to be paid the plaintiff, counsel for defendants again indicate that they have overlooked the essential nature of this action. They have considered it as mainly an action for the infringement of patent rights, whereas it is mainly a stockholder's bill to right a wrong done a corporation and only incidentally in-

which that corporation has an interest. In all actions in equity brought by a stockholder on behalf of the corporation because the directors refuse to act the plaintiff, if successful, is entitled to an attorney's fee. This is the well-established rule (see *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. page 477). That was an action by a stockholder on behalf of a corporation against directors guilty of malfeasance in office and the court in upholding a judgment in favor of the plaintiff for attorney's fees said:

“He (the plaintiff) sued on behalf of the corporation to recover a fund in which others were equally interested, and the judgment in his favor was for the use and benefit of the corporation. He was, therefore, not entitled to receive the amount of the judgment himself, but clearly was entitled to an allowance out of the moneys collected of his reasonable expenses, *including counsel fees*. This right to his expenses was sufficiently shown by the allegations of the complaint, and the prayer for general relief authorized the court to make proper provision for their payment.”

See:

Meeker v. Winthrop Iron Co., 17 Fed. 48.

That was an action by stockholders on behalf of the corporation because the directors and officers thereof would not act. There the court said:

“And as the complainants have prosecuted this case for the common benefit of all the parties interested, to protect and preserve a trust fund, they are entitled to be reimbursed therefrom for all proper expenditures made or liabilities necessarily incurred in and about the prosecution of

the same. A master will, therefore, be appointed to hear proof, and take and report in reference to the accounts hereinbefore ordered, and to ascertain what will be a *proper allowance to complainants for their counsel fees and other necessary expenditures made or to be made by them in and about the prosecution of this suit*" (pages 52-53).

See also:

Graham v. Dubuque Specialty Machine Wks.,
114 N. W. 619;

Trustees v. Greenough, 105 U. S. 527;

Cook on Stock and Stockholders, Sec. 48;

Forrester v. Boston Mining Co., 74 Pac. 1088.

Counsel says that the plaintiff is limited solely to the recovery of the solicitor's docket fee. He would be correct if this was an ordinary action for the infringement of a patent. But as this is an action in equity by a stockholder in favor of a corporation the rule that is set forth in the above cited cases applies and the lower court was justified in the exercise of its powers as a court of equity in making provision in the decree for the payment of the expenses of the plaintiff in this action, *including a reasonable attorney's fee.*

**NEITHER REES NOR HINE NOR THE REES BLOWPIPE MFG.
CO. HAD ANY RIGHT TO CANCEL THE LICENSE AGREEMENT.**

Counsel devotes about ten pages of his brief to the contention that the attempted cancellation of the license agreement of the corporation was valid and that

fault that the license was cancelled. The lower court heard the testimony and read the exhibits and its findings on the facts should control. Counsel lays great emphasis upon the proposition that the court in its memorandum of opinion says that the details of the evidence had escaped him at the time he wrote his decision. His opinion, however, shows that very little of importance had escaped him. The documentary proof was before him when he wrote this opinion and he had before him the transcript of the evidence and voluminous briefs written by both sides quoting the evidence, which each side claimed supported its theory of the case. So there is no basis for the claim of counsel that the court decided against his clients because it had forgotten the evidence. It had the briefs, transcript and exhibits before it and its opinion indicates that it took into consideration the salient points in the evidence.

There are several reasons why the attempted cancellation was invalid. Before stating them we will direct attention to certain equitable principles involved. First.—The right of cancellation is a *right of forfeiture*. In attempting to enforce a cancellation defendants are *enforcing a forfeiture*. The rules applicable to forfeitures, therefore, come into play. They are: (1) equity abhors a forfeiture and will seize upon slight circumstances to avoid sustaining one (21 C. J. Equity 101-103, Sec. 78). *Henderson v. Carbondale Coal & Coke Co.*, 11 Sup. Ct. 691, 694, where the court said:

“Upon this matter we observe that it is evident from the statement of facts heretofore made that the claims of the intervenors rest upon no equitable considerations, but only on the letter of the law. They do not seek to continue their contract and recover the rent, but to enforce a forfeiture; *and forfeitures are never favored. Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto.*”

See also:

Foley v. Grand Hotel Co., 121 Fed. 509, 512.

“Courts of equity will grant relief against a forfeiture which has been incurred through accident or mistake, or by reason of any fraudulent, oppressive, or *unfair conduct on the part of one who is asserting a right of forfeiture; but a chancellor will not lift his hand to aid a litigant in enforcing a forfeiture.*”

Accordingly a court of equity will seize upon any circumstances which tend to show a waiver of strict compliance with the contract and a forfeiture by the parties entitled thereto (see 21 *C. J.* page 104; *Elliott on Contracts*, Sec. 3771; *Pomeroy's Equity Jurisprudence*, 3rd Edition, Secs. 451 and 455). Almost any act by which the person entitled to declare the forfeiture recognized the continued existence of the contract or has led the defaulting party to believe that the forfeiture will not be enforced has been construed as a waiver of the right of forfeiture. Among such acts are the taking of security for the amount in default (see, 39 *Cyc.*, Vendor and Purchaser, page 1395; *Rump v. Schwartz*, 10 N. W. page 99; *Dreier v. Sherwood*, 238 Pac. 38). Once having

waived the forfeiture and having led the defaulting party to believe that it would not be insisted upon it is the well-established rule that the party entitled to declare the forfeiture cannot do so *until he has given reasonable notice of his intention to do so, and has given the defaulting party a reasonable opportunity to comply with the terms of the agreement*. In other words, "He cannot use his own indulgence as a trap in which to catch the defaulting party" (39 *Cyc.* 1385).

See: Decision of Judge Rudkin in
Douglas v. Hanbury, 104 Pac. 1110;
Boone v. Templeton, 158 Cal. 297.

Applying these principles to the facts respecting the cancellation of this license we have the following reasons why the attempted cancellation was invalid:

First. Assuming that the royalties had not been paid the defendants, Rees, Hine and the Rees Blow-pipe Mfg. Co., had indulged the corporation in the alleged non-payment of these royalties for nearly a year and had thus waived strict compliance with the contract at least until a reasonable notice and opportunity was given the corporation that such compliance would be required. *No such notice or opportunity was given the corporation previous to the cancellation. The cancellation notice was the first notice given by Rees and Hine of any intention to forfeit the contract.* No notice was given; no demand made; no reasonable notice or opportunity was given the corporation to prevent the cancellation of the license or to meet any demand for royalties, in fact no demand

for these back royalties was made prior to the cancellation. In fact Neal testifies (R. 256) as follows:

“Q. After the service of that notice upon you of January 12, where the license was cancelled, you took no action to prevent it, did you?

A. No, sir.

Q. Prior to the cancellation of the license, was any demand made upon you as president of the company for the payment of the back royalties?

A. No, sir.

Q. Was anything said about making such a demand?

A. No. *There were times when it was said it was not wished to be made.*

Q. Prior to that time of that cancellation, was any effort made that you know of to raise the money to pay these royalties?

A. None that I know of.

Q. None of you asked Lombard or Powell, that you know of, to agree to the use of these notes, or the use of the money in bank or the money available to take care of this royalty account?

A. No” (R. 257).

The testimony of Lombard and Powell is to the same effect. Neal says here that they did not want to make any demand or give any reasonable notice or opportunity to meet the demand for the very obvious reason that their attempted cancellation might have then been forestalled. No reasonable notice or any opportunity was given Lombard or Powell, the other two directors of this corporation, or its stockholders to meet this claim for royalties, or to prevent the attempted cancellation.

Moreover, Hine admits (R. 191) that he told Lombard that he and Rees would be willing to take long-term notes on account of the royalties. He furthermore admits that he received these notes. He then states that after his quarrel with Lombard no demand was ever made for the royalties and he cancelled the contract without any previous notice. His testimony in this regard is as follows:

“Q. After this row occurred, did you ever at a Board of Directors meeting demand your royalty?”

A. No, sir.

Q. You never did?

A. Not to my knowledge.

Q. Did you ever state that you were not willing—did you ever state to them after that time after the row occurred, or before, that you were not willing to take the long-term notes?

A. No, sir.

Q. Did you ever make a written demand on the Board of Directors for the royalty that was due you and advise them that you would cancel the agreement if it was not paid?

A. I don't believe we did.

Q. And the first notice that was given the Board of Directors as far as you know, that you contemplated cancelling the contract and not accepting the long-term notes, was the notice that was delivered to Mr. Neal at the meeting on January 13?

A. I think so.

Q. And at that time only Neal, the president, and you, the secretary, and Hine were present?

A. And Mr. Rees.

Q. Yes, I mean Mr. Rees.

A. Yes” (R. 191-192).

Accordingly it is established that the attempted cancellation was absolutely void because there was no

compliance with the well-known equitable rule requiring a reasonable notice and opportunity to perform. This is the first reason why the attempted cancellation was invalid. There are others just as strong.

Second. Hine and Rees and the Rees Blowpipe Mfg. Co. accepted collateral as security for the payment of these royalties. This, under the well-established equitable rules, in itself constituted a waiver of forfeiture at least until the security accepted was exhausted. The method of doing business on the part of the corporation was as follows: it would get a contract for the purchase from it of one of these devices. The contract would require the purchase moneys to be paid in installments, which installments were evidenced by notes of such purchasers. When this order was obtained the corporation would place an order with the Rees Blowpipe Mfg. Co., to manufacture the patented device referred to in the contract. The Rees Blowpipe Mfg. Co. would manufacture that device and deliver it to the purchaser and charge the corporation with the cost thereof as agreed in the manufacturing agreement. The defendants, Rees and Hine, were the two stockholders of the Rees Blowpipe Mfg. Co. They were also the real owners of the patent which stood in the name of the Rees Blowpipe Mfg. Co. From time to time the Rees Blowpipe Mfg. Co. would render statements of the moneys due it from the corporation. These statements are in evidence (Defts. Ex. C). Included in them was one dated, September 5, 1922. Included in these statements up to and including September 5th were not

only the moneys due for the manufacturing but also the moneys due for royalties under the license agreement (see Defts. Ex. C). From time to time the corporation would pay to the Rees Blowpipe Mfg. Co. sums of money in payment of the amount shown to be due by these statements and would deliver to them certain notes or contracts obtained from the purchasers of these devices. These notes were credited as payment just the same as cash as far as any notes delivered prior to September 5, 1922. The statement of September 5th, shows total debits for manufacturing costs and *royalties* of \$50,769.59 and credits for cash and notes accepted as cash of \$29,863.88, leaving on that date a balance due, including royalties, of \$20,905.71. After this statement of September 5th was rendered showing that \$20,905.71 was the balance due *including royalties* a so-called "big batch of notes" were delivered to Rees and Hine by the corporation (see Defts. Ex. J; see "notes discountable account" in ledger of the corporation). The face value of these notes amounted to \$24,875.00 (see notes discountable account). The evidence shows that \$8150.00 of these notes, to wit, the Kooser, Stevens and Turner notes were taken and applied by Rees and Hine to the royalties then due them (Rees testimony, R. 247; Neal, R. 259. Notes discountable accounts show these notes had face value of \$8150.00). Lombard and Powell claimed that these notes were taken in payment of the royalties while Rees and Hine claimed subsequently that they were merely taken as security. But the fact remains that on the date of the attempted cancellation of the license Rees

and Hine had accepted and held notes of the third persons endorsed by the corporation *either in payment of the royalties due under the license agreement or else as security for their payment*. The receipt of these notes and the application to the royalty due had been entered in a royalty account book kept by Rees and Hine. This royalty account is in evidence in the action. It is marked on the fly-page thereof "C. Rees and C. F. Hine royalty account". Realizing that the entry of the receipt of these notes as payment on account of the royalties and their application to the royalty account and their entry as such in this book made it impossible for them to claim that the corporation had not complied with its license agreement, the defendants Rees and Hine destroyed the pages in this book containing these accounts. But Neal, the president, of the corporation and the one to whom the new license was given, testified that the defendant Hine had admitted to him that he realized that in view of these entries in this book they had no right to cancel the license agreement which they attempted to do (R. 279).

Accordingly we find that the evidence clearly shows that the royalties due under the license had been paid in part and the payment of the balance thereof had been amply secured. The security of \$24,875.00 was \$4000.00 in excess of the total amount due for manufacturing and royalties. As Rees and Hine and the Rees Blowpipe Co. *had received and accepted security for this indebtedness* they waived any right which they may have had to cancel and forfeit this license for non-payment, at least until they had exhausted

reasonable notice and opportunity to meet their demands. For this reason alone therefore the cancellation of the license was invalid.

Hine testified (R. 190) as follows:

“A. At one time we were discussing taking these notes over for the accounts, and the point at issue about the patents was brought up in this way, that if Mr. Lombard could not raise money and pay us, that if the worse came to the worst, as I put it *once before, we would take the long-term notes as payment on the royalties.*”

Q. Take the long-term notes, the notes of the Progressive Evaporator Company?

A. Yes, a part of those notes that were under discussion.

Q. You refer to notes which purchasers had given the Progressive Evaporator Company, do you?

A. Yes.

Q. And did you state that you were willing to take those long-term notes on account of the royalties?

A. At one time we did, yes.”

(R. 194):

“Q. You did make some division of certain notes that you had?

A. Yes, sir.

Q. What were those notes?

A. I cannot tell you.

Q. And you made a division of them on account of royalties, did you not?

A. *Yes, because he had that discussion with Mr. Lombard previous to that time.*

Q. Did you make any division of cash received on account of royalties?

A. No, sir.

Q. You just made the division of the notes?

A. Yes, after that discussion.”

In other words he admits that he agreed to take long-term notes in payment of royalties and that he actually took these notes after this discussion with Lombard and applied them to the royalties. According to his own admission therefore the royalties were paid. According to his own admission he had waived a forfeiture by indulging the debtor and taking notes in payment. This was done by agreement with Lombard when Lombard was president of the corporation. Accordingly under the rules of equity adopted to prevent forfeitures the defendants had no right to declare this forfeiture as they had been paid by the receipt of these notes and the application thereof to royalties. It is no wonder that Hine told Neal that in view of the entries in the royalty account book showing payment of these royalties he doubted if they could cancel the license (R. 179). It is no wonder that when the case came on for trial those records in this account book had been destroyed. Not only had the records in the account book been destroyed but Powell had been employed to alter the books of the corporation which were then in the possession of the defendants and the statements rendered after September 5, 1922, by the bookkeeper were changed in an attempt to show that the moneys therefore received and credited on royalties had not been so applied.

Third. Counsel claims that the court erred in holding that the attempted notice of cancellation was ineffective because not signed by the Rees Blowpipe Mfg. Co. This was only one of the grounds which made the attempted cancellation ineffective. The

others, above given, are much more substantial and support the finding that the attempted cancellation of the license was void irrespective of whether or not the notice of cancellation should have been signed by the Rees Blowpipe Co. The fact that the notice of cancellation was not signed by the Rees Blowpipe Co., made the notice ineffective. It is true that Rees and Hine were the licensors. When they made this license no patents had been granted but on April 18, 1922, a patent was granted not to them but to their assignee, the Rees Blowpipe Mfg. Co., and thereafter the Rees Blowpipe Mfg. Co., with their knowledge and consent and through them rendered bills to the corporation for royalties up to and including the statement of September 5, 1922. This indicated that certain of the rights of Rees and Hine under the license agreement had been transferred to the Rees Blowpipe Mfg. Co., and that it was not only the holder of the bare legal title to the patent but also had some beneficial interest in the license agreement. There is no evidence that this interest of the Rees Blowpipe Mfg. Co. in this contract was merely that of trustee and of the bare legal title. There is no evidence that even if it was merely a trustee or holder of the bare legal title that knowledge of this fact was given the corporation. There is evidence that it rendered bills, through Rees and Hine and with their knowledge, for the royalties due under the license agreement. It clearly therefore had become, after the execution of the agreement by assignment from Rees and Hine, a party to the license agreement and interested therein. It was,

therefore, a necessary party to any notice of cancellation of the agreement.

In the case of *Henderson v. Carbondale Coal & Coke Co.*, 11 Supreme Ct. Rep. 691, above quoted, it was claimed that a contract had been cancelled. The contract required that notice of cancellation must be given personally. It was given by registered mail and the receipt produced in court but it was held that this was not sufficient. *It was held that one attempting a forfeiture must strictly comply with every step necessary to effectuate it.* Equity will seize upon any circumstance to prevent a forfeiture. Certainly under this rule the failure of one of the persons interested in the license agreement to declare it forfeited rendered the cancellation ineffective.

Counsel attempts to place the blame for the loss of the license on Lombard. Lombard was the holder of about forty-five per cent of the capital stock of the corporation. Counsel makes the gratuitous misstatement that Lombard contributed nothing to the assets of the corporation. There is absolutely nothing in the record in support of this statement. Lombard was the leading spirit in the organization of the corporation. He was the person that secured for it the exclusive license which was its most valuable asset. He devoted all of his time to the building up of its business so that in the first year of its operations it sold 24 plants (R. 128), the prices of which ranged from five to fifteen thousand dollars each (R. 141). This statement that Lombard contributed nothing to the assets of this corporation is a mere canard invented by the defendants to excuse their flagrant

violation of their duties as officers and directors of this corporation.

At this point let us refer to another gratuitous misstatement in counsel's brief about Lombard. He states that the corporation did not prosper on account of the failure of Lombard. There is no evidence that the corporation did not prosper through the failure of Lombard. The corporation was prospering. In the first year of its business it was making a substantial profit. It was for this reason that Neal, Hine and Rees wanted to secure the license and get the business themselves. There is not a statement in the record which substantiates counsel's claim that the business was a failure or that the failure was caused by Lombard. Counsel says that Lombard should have seen that the royalties were paid. Lombard was president up to November 1, 1922. The license was cancelled on January 13, 1923. Neal and Hine were president and secretary from November 1, 1922, to January 13, 1923. Lombard therefore was in no position after November 1, 1922, to direct the application of payments. Moreover, prior to his ouster as president, he had directed the application of these payments to royalties. This is indicated by the destroyed royalty account of Rees and Hine and by the statements to and including September 5, 1922 (Defts. Ex. C), which were rendered before Rees, Neal and Hine made their plan to get away the license and business of the corporation. Lombard did just what counsel says he should have done. He saw to it that the royalties were taken care of. *He obtained an agreement from Rees and Hine to take*

long-term notes in payment of royalties (see Hine's testimony, R. 190). He secured and gave them these long-term notes. He had statements from them showing the application of these notes to royalties and his books and their books, prior to the changes made by the defendants in an attempt to carry out their plan to loot the corporation, showed that these royalties had been paid and secured. It was necessary, therefore, for the defendants to change the books as they did.

Moreover as the lower court points out any dereliction on the part of Lombard would be no excuse for the violation by the defendants of their trusts. They were the officers and directors of this corporation from November 1, 1922, up to the date of the cancellation and thereafter. Upon becoming such officers and directors a duty devolved upon them to do their utmost for the protection of the interests of the corporation.

See: *Geddes v. Anaconda Copper*, 41 Sup. Ct. 212, where it is said:

“The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is

tiffs as stockholders bring this suit on behalf of the corporation to right those wrongs. A stockholder whether he owns one share of stock or one thousand shares, has this right. The mere fact that the stockholder bringing an action of this character may himself have been guilty of some wrong to the corporation, is no defense to an action brought by him on behalf of the corporation and is no excuse for the dereliction in duty of the defendants. An action of this character brought by a stockholder is brought by him in a representative capacity and not personally and his personal acts have no bearing on the situation.

See:

Witten v. Dabney, 171 Cal. 621.

CONCLUSION.

We respectfully submit that the decision of the lower court should be affirmed on the following grounds:

First: That the attempted cancellation of the license agreement was void

(1) because defendants had waived the right to cancel it,

(a) by accepting security for the payment of the royalties, and

(b) by agreeing to and taking long-term notes of third persons in payment of the royalties, and

(2) because prompt payment of royalties had never been insisted upon and strict compliance with the contract therefore could not be demanded without reasonable notice and an opportunity to perform which was never given, and

(3) because the license was cancelled in pursuance of an illegal agreement of the officers and controlling directors of a corporation to cancel the license and give it to one of their number, the president.

Second: That the defendants after cancelling the license of the corporation and stopping its business proceeded to manufacture and sell the same evaporators embodying the patented device in violation of the trust they bore the corporation and in violation of the license agreement. This manufacture and sale was admitted by the pleading; was conceded at the trial and was established by the evidence in many ways including the record of the payment and the receipt of royalties for the use of the patented device in the plants so manufactured and sold.

Dated, San Francisco,

May 26, 1927.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

6

CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a cor-
poration), and PROGRESSIVE EVAPORATOR COM-
PANY, INC. (a corporation),

Defendants-Appellants,

VS.

NORMAN LOMBARD, MONTGOMERY FLYNN, WILL-
IAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lombard,
Elizabeth Lombard and Norman Lombard,
Junior,

Plaintiffs-Appellees.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

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FILED

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F. D. MONCKTON,
CLERK.



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Elizabeth Lombard and Norman Lombard,
Junior,

Plaintiff's-Appellees.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

I. GENERAL STATEMENT OF FACTS.

This case comes before this court on an appeal from an interlocutory decree adjudging and enjoining infringement generally of one issued United States patent and *two pending applications for patents not yet issued*,* said decree being rendered in a suit where-
in infringement, alleged in the bill, specifically denied in the verified answer and nowhere admitted in the

* All italics herein may be deemed ours.

record, was found but no evidence whatsoever of the construction or operation of the device complained of was offered at the trial or is present in the record to show such infringement.

We will here briefly state the circumstances and the facts out of which arose the litigation which resulted in such a remarkable and unbelievable adjudication leaving for consideration in the argument a more detailed discussion of the various facts relied upon to show the necessity for reversal.

For convenience we will hereinafter refer to the appellees as the plaintiffs and the appellants as the defendants.

The improvement forming the subject matter of the patent, infringement of which is complained of in the bill is the invention of Rees, one of the defendants, and the improvements forming the subject matter of the two *pending applications* are the joint inventions of said Rees and the defendant Hine. Said Rees and Hine are each the owner of an undivided half interest in all of said inventions and letters patent (R. 213, 215, 216. See also license agreement R. 36). In order to understand how the owners of such inventions and the letters patent granted for one of them happened to be sued for infringement thereof in the trial court, it is necessary to consider for a moment the relationship existing between the parties to the litigation.

The Rees Blow Pipe Manufacturing Company, one of the defendants, as is common knowledge in this district, is an old and well established San Francisco concern and is engaged in the manufacture and sale of machinery such as its name implies. Said corpora-

tion is owned by Rees and Hine, Rees owning approximately two-thirds, and Hine approximately one-third of the capital stock of said company (R. 213). Rees and Hine, being the owners of the inventions mentioned, they together with defendant Neal formed a partnership for the sale of devices embodying such inventions. It is unnecessary here, or at any point in this brief to consider the construction or operation of such devices or any of the devices referred to herein other than to know that they relate to mechanism for drying fruit, because strangely enough, although this suit is one for alleged patent infringement *no evidence whatsoever was offered at the trial, or is found in the record showing the construction or operation of the devices* complained of as infringements or even the construction or operation of the inventions either of the patent or of the pending applications.

The business of selling said fruit drying mechanism or evaporators conducted by Rees, Hine and Neal was essentially a venture engaged in by Rees and Hine separate and apart from the business of their corporation the Rees Blow Pipe Manufacturing Company for the purpose of keeping such business separate from the corporation's business which was evidently of a different nature.

In order to further facilitate the purpose of Rees and Hine to conduct their business with respect to the sale of evaporators independently of the business of the Rees Blow Pipe Manufacturing Company, they decided to form a corporation to carry on said business formerly conducted by the partnership of Rees,

Hine and Neal. Such corporation was formed, and on February 10, 1922, Rees and Hine granted to it a license to manufacture and sell evaporators, said license being an exclusive one and including the three inventions here in question, *patents for none of which had been obtained at the time of the granting of said license.* This license is set out as exhibit "B" on page 36 of the record. In changing their evaporator business from a partnership to a corporation Rees and Hine selected the name of Progressive Evaporator Company, Inc., for the corporation so formed. An agreement was entered into between such corporation and the Rees Blow Pipe Manufacturing Company whereby the latter was to manufacture and supply evaporators to the former at prices agreed upon.

The incorporators of the new concern of Rees and Hine so formed, consisted of the said Rees, Hine and Neal, a bookkeeper Powell one of the defendants here in and plaintiff Norman Lombard. Lombard was then and still is an attorney at law (R. 148) and was made one of the incorporators and later an officer of the corporation because of assistance which he was supposed to give Rees and Hine in securing financial aid for their evaporator business (R. 321).

The business of Rees and Hine, formerly conducted by them with their partner Neal was transferred to their new corporation the Progressive Evaporator Company, Inc. (R. 45). It is to be noted and will hereinafter be explained in detail that the business of the new corporation was merely a continuation of the former business of the partnership, in both instances said business being essentially that of Rees and Hine as

individuals separate from their business conducted by the Rees Blow Pipe Manufacturing Corporation. Also it is to be noted that everything with which such business of the corporation was to be conducted was derived either from the former business of the partnership or from Rees and Hine. The attorney Lombard was connected with the new organization for the assistance which he might give in conducting its affairs and assisting in the financing thereof (R. 321). It is of controlling importance in this case to note that except for a trifling contribution in cash for a few shares of stock (R. 125), *Lombard contributed nothing to the assets of the new corporation.*

The affairs of the venture of Rees and Hine in manufacturing and selling evaporators through their corporation, the Progressive Evaporator Company, Inc. did not prosper, largely, as we will hereinafter show, through the failure of Lombard to give the necessary assistance to such business and to conduct the same as required (R. 198, 330-331). Royalties due to Rees and Hine under the license to the Progressive Evaporator Company, Inc., consequently became in arrears. Similarly monies due to Rees Blow Pipe Manufacturing Company for machines sold to the Progressive Evaporator Company, Inc. were unpaid. This condition of affairs continued until Rees and Hine realizing that their business of selling evaporators under their new form of organization in which Lombard was involved could not be a success and that the royalties due to them under the license were not being paid (R. 220, 307), decided to cancel the license in accordance with its provisions.

Accordingly, pursuant to the terms of said license agreement (R. 53), they served notice of cancellation and terminated said agreement, by notice dated January 12, 1923. Thereafter Rees and Hine made arrangements with defendants Neal and Ward whereby Neal and Ward were to undertake the sale of evaporators and the Rees Blow Pipe Manufacturing Company was to manufacture said plants for Neal and Ward.

Thus Rees and Hine having been unable to successfully carry on their business through their corporation the Progressive Evaporator Company, Inc., because of Lombard's interference therewith, they undertook to engage in the manufacture and sale of evaporators through the new arrangement above mentioned. Mr. Lombard, on the theory that as a stockholder of the evaporator company of Rees and Hine he had been deprived of some rights through such cancellation of the license and that said cancellation was for that reason ineffectual, and the license still in force, brought suit as a stockholder of the Progressive Evaporator Company, Inc. against Rees, Hine, Neal, Ward and Rees Blow Pipe Manufacturing Company and other defendants alleging infringement by them of the exclusive rights granted to the Progressive Evaporator Company, Inc. Service of the *subpoena ad respondendum* was not had upon any of said defendants other than those named above (R. 55, 56, 57, 58). The bill was taken *pro confesso* against defendants Neal and Ward, and Rees, Hine, Rees Blow Pipe Manufacturing Company and Progressive Evaporator Company, Inc. answered the bill. In said suit, Lombard joined with him as plaintiffs other

persons who, so he alleged, had acquired some interest in the few shares of stock issued to him.

From this it will appear that in the suit below the cause of action asserted by Lombard was a twofold one depending upon the establishment of *two propositions* before the plaintiffs could prevail; first that the acts complained of constituted infringement of the exclusive rights in question and secondly that the cancellation of the license by Rees and Hine was ineffectual so that sufficient title to the exclusive rights granted by the license existed to sustain the right to sue. As far as defendants Rees and Hine were concerned, they, of course, could not deny the validity of the patent in suit and did not attempt to. However, in their pleadings they, and the other answering defendants, specifically denied infringement. On the issues so framed, the burden was clearly left upon the plaintiffs to establish (1) the tort complained of, i. e., infringement, and (2) the invalidity of the cancellation by Rees and Hine. No burden whatever was placed upon the defendants in such a case. The plaintiffs, in order to prevail, necessarily had to establish both matters mentioned above.

The case went to trial upon the issues raised as explained above. The plaintiffs offered proofs in an effort to show that the cancellation of the license was invalid but failed entirely to offer any proof whatever with respect to the issue of infringement. They failed even to offer the original patent in suit or a certified copy thereof showing the drawings, specification and claims relied upon. Apart from a printed copy of said patent, annexed to the bill of complaint, as an exhibit

nature or contents of said patent. Similarly the plaintiffs failed entirely to offer any evidence whatsoever with respect to the construction or operation of any device herein complained of as an infringement. At the close of the case defendants moved the court for dismissal of the bill upon the ground that the plaintiffs had failed entirely to establish the material allegations of the bill (R. 399). The cause was submitted on briefs and thereafter the court rendered its opinion pursuant to which a decree was entered finding the defendants Rees, Hine, Rees Blow Pipe Manufacturing Company, Progressive Dehydrator Company a copartnership and Ward and Neal the partners thereof guilty of infringement and ordering that said defendants be enjoined from making or selling "any device or apparatus embodying or containing the *inventions* described and claimed in and by said letters patent *and in and by said applications for letters patent*"; that the cancellation of the Rees and Hine license to Progressive Evaporator Company, Inc., was invalid so that plaintiff had the right to sue for such infringement; that Progressive Evaporator Company, Inc. recover from said defendants the profits and damages arising from said infringement of said letters patent *and said applications for patents*; that it recover also damages for the cancellation of the license and that the court reserved the right to enter judgment in favor of the plaintiffs for such amounts and in addition thereto an *attorney's fee*.

On such a record, it would be difficult indeed to conceive how such a decree could be granted were it not for the light thrown upon the situation by the memo-

randum opinion of the court below. As explained therein, the court took up the consideration of the case many months subsequent to the trial and after many of the detailed facts had escaped its memory. Thus, in the opinion, it is said:

“Tried in July, the case well might have been decided forthwith, but time for briefs was secured, the last of which was filed in November. In consequence *much of the extensive details have escaped memory (praise be).*”

Neither time permits nor duty requires a busy court, at a time long subsequent to trial, to laboriously *peruse the testimony and winnow exhibits to recover details*—virtually retry the case, nor can delay for briefs impose that obligation upon any court.”

As we will hereinafter show, the errors in the adjudication under review are most evidently attributable to the lack of recollection admitted in the above quotation.

After due summons and severance with respect to defendants Neal and Ward individually, and as partners doing business as Progressive Dehydrator Company, against whom an order for decree *pro confesso* had been entered (R. 401, 402, 403) the appellants took this appeal.

II. THE DEFENSES RELIED UPON.

The decree appealed from, we submit is erroneous and should be reversed for the following reasons and upon the following grounds:

A. The plaintiffs have wholly failed to sustain the burden upon them to establish the alleged tort of infringement.

B. The plaintiffs have wholly failed to sustain the burden upon them to show invalidity of the cancellation of the license under which they claim.

C. There was no evidence to support, and the court below had no jurisdiction to award an injunction against infringement of the *pending applications* mentioned in the decree, nor the accounting ordered with respect to such infringement.

D. The facts do not support and the court below was without jurisdiction to make the award of attorney's fees.

III. THE PLAINTIFFS HAVE WHOLLY FAILED TO SUSTAIN THE BURDEN OF PROOF UPON THEM TO ESTABLISH INFRINGEMENT.

From what has been said above, it will appear that in the court below *two matters* had to be established to enable plaintiffs to succeed in the cause; first, that the tort complained of, to-wit, infringement, had been committed and secondly, that the cancellation of the license to Progressive Evaporator Company, Inc. was invalid so that plaintiffs had capacity to sue. It would avail plaintiffs nothing and did avail plaintiffs nothing to prove either one of these propositions. It was inevitably essential to their case to prove *both* with the degree of proof required by the well recognized rules of law. On this appeal, however, the situation is reversed, for in order to reverse the decree, it is but necessary to show that plaintiffs have failed to sustain the burden upon them to prove infringement. This being established, it becomes wholly immaterial whether or not the cancellation of the license was

valid, or whether or not the Progressive Evaporator Company, Inc. had an exclusive license *which might be infringed*. Plaintiffs clearly are not entitled to a decree if they have failed to prove any infringement of such exclusive license. It follows therefore that the first question to be examined in this court and indeed the only one which needs to be examined is whether or not a decree for infringement can be sustained where no proof of the alleged infringing act complained of is offered by the plaintiffs, for if a decree cannot be sustained in the absence of such proof, that is an end of the matter and a reversal necessarily follows. We therefore will consider here first the question of infringement and deal later with the question of the cancellation of the license.

A. Infringement Is a Tort and the Burden of Proving It Affirmatively Is Upon the Plaintiffs.

The issue of non-infringement is clearly raised by the pleadings. In the bill of complaint verified by Lombard, infringement is alleged as follows:

“That thereafter the said Neal, Rees and Hine, entirely neglected the business of the said Progressive Evaporator Company, Inc., and disregarded and ignored its rights in all particulars, and in violation and infringement of the patent rights and of the letters patent covered by the said license agreement, in which the said corporation has an interest by virtue of said license agreement, the said Rees and Hine, and the Rees Blow Pipe Manufacturing Company, Inc., and the said defendants Neal and Ward individually, and as copartners have manufactured and sold and are now manufacturing and selling the said patented de-

...vices, and that said defendants last above mentioned ever since the 13th day of January, 1923, in pursuance of said fraudulent conspiracy and scheme have infringed and violated the said rights secured by said patents above referred to, and the interests of the Progressive Evaporator Company, Inc., to said patent rights created by said license agreement.

* * * * *

That the defendants Dee Hi Food Products Company, A. C. St. Marie with full knowledge of the facts set forth hereinbefore and well knowing the rights of the Progressive Evaporator Company, Inc., as set forth herein, to exclusively manufacture and sell the said drying systems and equipment, have assisted, and are now assisting and aiding and abetting the defendants, Rees, Hine, Neal, Ward and the Rees Blow Pipe Manufacturing Company, Inc., in the manufacture and sale of said devices, drying systems and equipment, and in the infringement of said patent and patent rights" (R. 22, 24, 25).

The answer to said bill of complaint verified by defendant Hine specifically denies said allegation of infringement in the following words:

"These defendants deny that thereafter, said Neal, Rees and Hine, or any of them, neglected entirely, or otherwise, or at all neglected the business of said Progressive Evaporator Company, Inc., and/or disregarded and/or ignored its rights in all or any particulars and/or in violation and/or infringement of the patent rights and/or of the letters patent covered by said license agreement said Rees and Hine and/or Rees Blowpipe Manufacturing [67] Company,

Inc., and/or said defendants, Neal and Ward, individually and/or as copartners have manufactured and/or sold and/or are now manufacturing or selling said patented devices and/or that said defendants Rees, Hine and Neal, or any of them, ever since January 13th, 1923, in pursuance of said fraudulent conspiracy and/or scheme and/or at any other time or at all, have infringed and/or violated said rights secured by said patents above referred to, and/or the interests of said Progressive Evaporator Company, Inc., to said patent rights created by said license agreement.

These defendants deny that the defendants, Dec Hi Food Products Company and A. C. St. Marie, or either of them, as alleged in Paragraph XVIII of said complaint, or otherwise, or at all, have assisted, and/or are now assisting and/or aiding and/or abetting defendants Rees, Hine, Neal, Ward and Rees Blowpipe Manufacturing Company, Inc., or any of them, in the manufacture and/or sale of said devices, and/or drying systems, [69] and/or equipment, in the infringement of said patent and/or patent rights, or any thereof" (R. 78, 81).

The issue framed by the pleadings as quoted above is the usual issue of non-infringement in a patent suit.

It is true that the bill of complaint contains allegations and the answer denials with respect to infringement of rights under the license agreement. This, however, is mere surplusage with respect to the allegations of strict patent infringement and has no place in this case. Concededly the jurisdiction of the court below and of this court depends upon the fact that

the suit is one for alleged infringement of letters patent and not for breach of any contract. This is necessarily so because no diversity of citizenship appears or exists to support any action upon the contract alone. The suit is essentially and primarily one for infringement of a patent.

The bill of complaint then, alleging infringement of a patent and the answer under oath denying specifically such allegation, the burden was upon plaintiffs to affirmatively prove the manufacture and sale of a device *embodying the combination of elements defined in one or more of the twelve claims* of the patent in suit. The burden was upon them to do this not by mere evidence showing the *possibility* or *probability* of infringement but by evidence *affirmatively showing with reasonable certainty that the defendants made or sold or used a device embodying said invention so claimed in one or more of the twelve claims of said patent*. It is not enough that evidence be produced from which such infringement might be inferred or conjectured. *The proof in this regard must be positive and clear.*

From an examination of the uncertified copy of the said patent forming exhibit "A" to the bill of complaint (R. 28), it will be seen that said patent covers an invention of a very narrow and restricted scope, residing principally in details of construction. Each of the twelve claims is a combination claim consisting of an enumeration of a long list of elements, each forming part of the claimed combination. It is elementary that to show infringement of such claims, it is essential to show in the machine complained of *the presence of each and every of the enumerated*

elements of the claim relied upon, operating in the alleged infringing device according to the same mode of operation as that of the machine of the patent and accomplishing the same result, in order to establish infringement of said claim.

“Omission of one element or ingredient of a combination covered by any claim of a patent, averts any charge of infringement based on that claim, whether or not the omitted ingredient was essential to the combination of the patent, and whether or not it was necessary to the operative-ness of the device. And it makes no difference that another element is made to do the work of itself and of the omitted element. A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all the parts of a combination material, when he claims them in combination and not separately.”

Walker on Patents, (5th Ed.) pp. 433, 434.

The existence of such facts must be established by the plaintiffs according to the rule of the burden of proof stated above. This rule has been variously expressed in the authorities.

“*Infringement is a tort*, and the burden of proving the commission of a tort rests upon him who asserts it. *If the tort is not clearly established then infringement should not be found.*”

Valvona-Marchiony Co. v. Perella, 207 Fed. 377, 379.

The Circuit Court of Appeals for the Third Circuit has expressed the same rule as follows:

“Infringement of a patent is not only a question of fact, *but is a tort or wrong, the burden of*

establishing which, as in all torts, clearly rests on those who charge such wrong; and the absence of actual fact proof is not met by the presence of expert speculations, no matter how voluminous." (Syllabus.)

Fried Krupp Aktien-Gesellschaft v. Midvale Steel Co., (C. C. A. Third Circuit), 191 Fed. 588.

In a case very similar on its facts with the case here presented, the Circuit Court for the Northern District of California applied the same rule and dismissed the bill for failure of the plaintiff to sustain the burden upon him in this regard. In that case as in this one, there was a verified answer denying infringement.

In its decision, the court said:

"Again, there is no positive testimony that these boots were made, or sold, by the defendants at all. The one witness on the point testifies that he sold the boots to the complainant in this case, and he thinks it is a pair of boots that his own firm purchased of the defendants. He does not know it, but thinks so. That is all there is of that.

The other circumstance relied on is that there is a mark on the boots, which purports to be the mark of the defendant; but there is no testimony that it is the mark of the defendant, or when or by whom it was put on the boots. Defendants are required to answer under oath, or, what is the same thing in substance, an answer under oath is not waived in the bill, and they deny, under oath, categorically and directly, that they made the boots alleged in the bill to have been made, 'prior to the filing of the bill, or otherwise'. *They deny the infringement alleged, and it requires positive testimony to overthrow that answer. The answer, so far as responsive to the bill, directly*

denying the matters alleged, *not only makes an issue, but it is testimony in the case called for by complainant, proving the issue for defendants; and it must be overthrown by the testimony of two witnesses, or the testimony of one witness, and circumstances equivalent to another, or at least, sufficient to make a preponderance of testimony in favor of complainant.*

* * * * *

Only one witness testified that he thought his firm bought the boots of defendants. I am compelled to say that this testimony is insufficient to overthrow the positive denials of the answer, or to establish an infringement. *The burden was on the complainant to show that fact by affirmative evidence.* It is not necessary to investigate the other points. The bill is dismissed on the grounds alone of an insufficiency of the evidence to show an infringement, and failure, also, to show an infringement before the filing of the bill."

Slessinger v. Buckingham and others, 17 Fed. 454, 455, 456.

It is not sufficient that the plaintiff may show circumstances from which it may be *suspected* or *inferred* that infringement took place. Proof of such fact must be affirmatively established by unequivocal evidence. In the absence of such proof, the bill of complaint must be dismissed and any decree unsupported by such proof clearly should be reversed.

Dealing with such a situation, the Circuit Court of the Southern District of New York said:

"The contention of the complainant is based entirely upon *suspicion and conjectural inferences* drawn from the printed label on the can containing the baking powder. But this is not sufficient, especially when it is borne in mind that *the allegation of infringement charges a tort, which must be satisfactorily proved.* King v. Anderson, (C.

C.) 90 Fed. 500; Edison Electric Light Co. v. Kaelber, (C. C.) 76 Fed. 804; Slessinger v. Buckingham, (C. C.) 17 Fed. 454. In the absence of evidence indicating that the defendant made, used, or sold the infringing article, or attached the label to the can containing the baking powder, or was engaged in its manufacture in the Southern District of New York, I am not inclined to adopt the complainant's view that a prima facie case of infringement has been established."

Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953, 954.

In dismissing a bill for failure of a plaintiff to sustain the burden of proof under discussion, the Circuit Court for the Eastern District of Pennsylvania, said:

"I agree with the decision in *Westinghouse Electric Co. v. Stanley Electric Co.*, (C. C.) 116 Fed. 641, that, since the commission of an act of infringement within the district has been made essential to the jurisdiction of the court, it is necessary to prove a completed act, and not *merely a threat, or an evident purpose to infringe upon the rights of the patentee*. Indeed, the complainant does not dispute the correctness of this position, but undertook in conformity therewith to prove that the defendants had sold in this district a lamp that infringed his patent. As it seems to me, however, the evidence that was offered upon this point leaves the matter in so much doubt that he cannot be said to have sustained the burden of proof that undoubtedly rested upon him.

* * * * *

The defendants did not deny that they had advertised the Majestic lamp in certain numbers of a periodical that were offered in evidence. A lamp of the complainant's design was then produced before the Examiner, and afterwards in court, and the comparison between this lamp and

the picture in the periodical was relied upon to complete the proof that the lamp which, according to the declarations of the salesman, had been sold in Philadelphia by the defendants, infringed the complainant's patented design. Admittedly, therefore, there is no direct proof of a sale, and the question for decision is whether the evidence fairly justifies the inference that an infringing article was sold in this city.

* * * * *

For the reasons thus indicated, I cannot avoid the conclusion that he has not produced the proper degree of proof, and that the evidence is not sufficient to satisfy the court that infringing lamps have been actually sold in this district.

Apparently feeling the force of these objections, which were vigorously urged at the final hearing of the cause on June 26, 1906, the complainant presented a petition on July 7th, asking that the case might be reopened to permit him to offer further proof concerning the sale of an infringing lamp. I have carefully considered the affidavits that were presented in support of this motion and in opposition thereto, and I am of opinion that the complainant has not made out a sufficient case for rehearing, within the established rules governing the practice of the courts upon such motions. A rehearing must therefore be refused."

Gray v. Grinberg et al., 147 Fed. 732, 733, 734.

B. The Burden Upon Plaintiffs In This Case Has Not Been Sustained.

It remains but to consider whether the plaintiffs in this case have sustained the burden of proof as required by the weight of authority as shown in the above cases. It will be recalled that, as in the *Slessinger v. Buckingham* case, *supra*, the allegations of infringement in the bill of complaint herein are specifically denied in the verified answer. We have

searched carefully the entire record in this case and fail to find any evidence offered in support of the issue so raised, except for some testimony (R. 203, 204) to the effect that evaporators (the construction of which is in no way identified) were sold by defendants Neal and Ward. The patent in suit, even, was not offered in evidence at the trial. The only information which we have concerning said patent is to be derived from an uncertified printed copy thereof attached to the bill of complaint as an exhibit. A photostatic copy of the cover page of the original patent was offered in evidence as Plaintiffs' Exhibit No. 4 but as will be seen from an examination of said exhibit the same contains neither specification nor drawings nor claims. Nothing whatsoever was offered with respect to the two pending applications, infringement of which is depended upon, so that as to the nature of the inventions covered in such pending applications the record is wholly silent. We do not of course concede for a moment that there can be any infringement of a pending application, yet we deem it worthy of consideration at this point that although plaintiffs relied upon infringement of said pending applications, no evidence whatsoever with respect thereto was offered. Similarly *no evidence whatever is found in the record concerning the construction or mode of operation of any device complained of as an infringement herein. No testimony or exhibit showing what such construction or mode of operation may be, is found at any point in the record.*

In view of the specific and detailed nature of the invention covered by the only issued patent in ques-

tion it is most apparent that in order to show infringement of such patent it would be necessary to prove in great detail the exact construction and operation of the machine complained of as an infringement for, according to well recognized principles (*supra*, p. 15) if such machine complained of omitted *any one* of the numerous *elements* of the combinations respectively defined in the claims of the patent, such machine would not infringe. For instance, claim 12 of the patent is for the combination of the following elements:

“A drying apparatus comprising—

- (a) a drying chamber,
- (b) tiers of trays in said chamber for the material to be dried and arranged with
- (c) a passage above the material on each tray extending through the tiers transversely only of said chamber,
- (d) trucks for conveying a succession of tiers of trays through said chamber,
- (e) heating chambers opening upon the side of said drying chamber and the passages through said tiers,
- (f) a plurality of passages communicating with said heating chambers and opening upon the opposite side of said drying chamber and the opposite ends of the passages through said tiers,
- (g) a fan in each of said communicating passages for inducing a current of air through said tiers, heating chamber and communicating passages,

direction,

(i) means for controlling the leakage of air currents between the successive tiers and below the trucks, and

(j) means for causing a gradual progression of the mass of air in said air current longitudinally through said drying chamber and the succession of tiers of trays therein.”

In order to show infringement of such claim it was incumbent upon plaintiffs to offer evidence showing positively and affirmatively and not by mere conjecture or inference, the manufacture, use or sale not merely of a machine of the same general character as that of the patent, *but a machine embodying each and all of the ten enumerated elements of the combination of said claim 12* and then to show further that such elements in the machine complained of operated according to the same mode of operation and accomplished the same results as in the machine of the patent (*Walker on Patents, supra, p. 15*). We find not the slightest evidence of this sort either with respect to claim 12 or any of the other claims of the patent in question. The record is wholly silent as to what the machines complained of may have embodied either as to their various parts or mode of operation or as to the results accomplished thereby. From these facts alone, it follows that the bill of complaint below should have been dismissed and it also inevitably follows that the decree finding and enjoining infringement must be reversed.

any admission appearing in the record which can serve to supply such lack of proof of infringement. A careful examination of the entire record shows that there is nothing therein to overcome the specific denial of infringement set out in the verified answer, and that as far as such record is concerned no admission can be relied upon by the plaintiffs to relieve them of the burden of proving with the required degree of certainty that the defendants have committed the tort complained of in the bill of complaint. Not only is there no admission to replace such failure of proof, but it appears from the record that at the close of the trial defendants' counsel moved for a dismissal of the bill on this very ground.

“Mr. BARRY. I want to make a motion in connection with the matter, your Honor.

The COURT. State it.

Mr. BARRY. I move at this time, for the purpose of preserving the record, for a dismissal of the action here in so far as these defendants are concerned, upon each and every of the following grounds:

That the plaintiff *has failed to establish the material allegations, and each and all of the material allegations of the complaint, or any thereof.*

The COURT. * * * The motion you just made is not really necessary, but it will be taken under advisement” (R. 399, 400).

How the trial court happened to fall into the error of finding infringement and decreeing accordingly on the record herein is difficult indeed to conceive. Pos-

the defendants Neal and Ward had been granted a license similar to that under which the Progressive Evaporator Company, Inc. operated, said defendants must necessarily have built and sold machines having the identical construction and mode of operation covered by the patent (and pending applications not in evidence) and that from such fact it might be assumed that infringement was shown. The cases referred to above, we submit, indicate conclusively that *the tort of infringement cannot be so presumed. It will never be assumed or presumed that any party has committed a tort.* The presumption naturally is that a person has acted rightly rather than wrongly. In other words, the mere fact that a person has a contract to construct a certain machine, which if carried out would result in infringement is not sufficient proof of infringement. It is entirely consistent with such fact that the machine actually constructed may not have been as called for in the contract. It must affirmatively be shown that such machine *was in fact constructed pursuant to such contract and did infringe* in order to support a decree for infringement in such case.

“There is an allegation of infringement on information and belief *and a positive denial under oath. There is no proof of actual infringement.* There is proof that *a contract was awarded the company which if carried out pursuant to the specifications may involve infringement and may not.*

* * * * *

Remembering that *the burden of proving infringement is upon the complainant*, and that even in a quia timet suit there must be ‘well

grounded proof of an apprehended intention to violate the patent right' it is thought that there is a failure to prove a case against the defendant."

Edison Electric Light Co. v. Kaelber, 76 Fed. 804, 806.

Similarly in another case it was held that although the defendant admitted that its alleged infringing device was constructed in accordance with a patent owned by it and it appeared that a machine constructed *according to said patent* would have infringed the patent in suit, there was nevertheless a failure of proof of infringement because the plaintiff failed to prove that any machine *actually constructed* by defendant under its said patent *did embody the invention* covered by the claims of the patent in suit.

"We concur in the conclusion reached by the court below as to claim 1 of patent No. 441,962, for the reasons stated by the court in its opinion. *The offer by defendant of a copy of an application for a patent, with a statement that the defendant is manufacturing thereunder, is insufficient alone to prove infringement.* It merely serves to show that the defendant claims to manufacture its devices under the protection of said application, so far as it may be material."

Morrill v. Hardware Jobbers' Purchasing Co. et al., C. C. A. Second Circuit, 142 Fed. 756.

Indeed in the case of a complicated machine such as appears in the only issued patent involved herein (R. 28) even if plaintiffs had offered a drawing of the machines complained of without other evidence as to the construction and *mode of operation* thereof, infringement would not have been shown.

print of the machine which the defendant is now using. It was voluntarily submitted to the complainants by the defendant, and was offered in evidence by the complainants as they closed their rebuttal proofs. The counsel for the complainants contend that it shows continued infringement by the defendant. *There is not a line of testimony explaining the exhibit. It is a complicated drawing, and it would be highly presumptuous in us to say it shows infringement. A combination claim is never infringed, except by the use of that which embodies every element of the combination or its equivalent. The burden of proof was on the complainants. Infringement cannot be found on the blue print alone. It follows that the complainants are not entitled to an accounting.*”

Morton Trust Co. et al. v. Standard Steel Car Co., C. C. A. Third Circuit, 177 Fed. 931, 933.

C. The Failure of the Plaintiffs to Prove Infringement Required a Dismissal of the Bill Below and Necessitates a Reversal of the Decree.

It is thoroughly well established that a decree for infringement awarding an injunction and accounting cannot be supported unless the plaintiff has fully sustained the burden upon him to show that the defendant has infringed the patent in suit. It follows therefore that the decree in this case must be reversed.

“Neither the patent nor the drawings are in the record, and the models have not been brought up. *Nor have we been able to find anywhere in the record a satisfactory description of the structure which the appellee uses. The burden of proving the infringement is on the appellant. The necessary proof in this respect has not been made, and the decree below is consequently—Affirmed.*”

Price v. Kelly, 154 U. S. 669.

is wholly lacking in any evidence to sustain any finding of infringement and the decree therefore must be reversed. It is too late now to remedy this fatal situation. In cases where, as in this one there is admittedly a state of facts where evidence on behalf of a party was equally as available at the time of the trial as subsequently and such evidence was not introduced at the trial, the great weight of authority clearly is to the effect that such party is precluded from thereafter attempting to mend his hold and return to the trial court for the purpose of *offering proofs which were fully available to him at the time of trial*. He cannot wait until an appeal and then hope to introduce such evidence in the appellate court.

“In the absence of statute, the great weight of authority is that defects in proofs cannot be supplied in the appellate court; that court can determine a cause only on the record of the court below, and cannot, without consent of the parties, hear additional proofs.”

4 *Corpus Juris*, 724.

The courts have applied the above rule to the case of a plaintiff in a patent suit who fails to sustain the burden upon him to prove the commission of the tort of infringement with the degree of certainty required by the authorities. The Circuit Court of Appeals for the Second Circuit, a court whose decisions in patent cases are entitled to great weight because of its wide experience in litigation of this nature, so held in the following case, in which it was said:

“*The only act of infringement shown is the sale of a burial casket by J. & J. W. Stolts, a joint-*

York City, on October 15, 1901. It was proved that the joint-stock association was organized January 27, 1896, that the number of its stockholders was eight, its place of business in New York City, and that Julius W. Stolts was in January, 1901, its president and treasurer. It was admitted by the defendant's counsel that at the time of the commencement of the suit in October, 1901, the defendant was such president and treasurer.

* * * * *

No infringing act committed personally by Stolts or by any partnership or association of which he is or was a member having been proved, defendant was entitled to a dismissal.

Complainant seeks to cure the defects in the record in either of two ways: First, he asks that, in the event of this court's being satisfied that the patent is valid, and that the casket sold by the association infringes its claims, the cause be remanded, with instructions to the Circuit Court to allow complainant to amend so as to aver that Stolts was a stockholder, and to reopen the cause so as to allow him to prove such amendment. No authority disposing in such way of a similar situation has been called to our attention, and such disposition would be fruitful of abuses. If relief were granted in one cause, it might be fairly claimed in another, and so whenever upon analysis of a record on appeal this court might reach the conclusion that the complainant's proof was not sufficiently convincing to show an act of infringement by defendant, a motion would be at once made to reopen the cause so as to give complainant a chance to make his case stronger. Such practice should not be encouraged.

* * * * *

The motions to reopen and to amend are denied, and the decree of the Circuit Court is affirmed, with costs."

National Casket Co. v. Stolts, C. C. A. Second Circuit, 135 Fed. 534, 535, 536.

The same court dealing with a similar question said:
“Appellant, after the decision of the case, moved to reopen it, in order to show that it used only fire brick, and did not use chamotte, within the meaning given to it by the court in its opinion. This motion was rightly denied. *The new evidence sought to be introduced might have been brought before the court at the original hearing.* Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.), 64 Fed. 125, and cases cited.”

Panzl v. Battle Island Paper Co., C. C. A. Second Circuit, 138 Fed. 48, 51.

Further elaboration upon the question hereinabove discussed seems unnecessary. The facts involved admit of no argument whatsoever. The question does not involve an examination of proof of infringement *to see if such proof is sufficient—there is no such proof whatever* in the record to be considered. The law applying to such facts is equally clear. It follows, therefore, that the decree appealed from must inevitably be reversed for lack of proof of infringement, alone, and such reversal entirely disposes of the case. Consideration of the remaining questions consequently becomes more or less immaterial. However, there are further errors in the decree appealed from which should be noted.

IV. THERE CAN BE NO INFRINGEMENT OF A PENDING APPLICATION FOR A PATENT AND THE DECREE APPEALED FROM SHOULD BE REVERSED FOR GRANTING AN INJUNCTION AGAINST SUCH INFRINGEMENT.

We have already adverted to the fact that the plaintiffs' case arises out of the contention that the

half they are suing has by virtue of the license agreement (R. 36) certain exclusive rights with respect to *three inventions*. From an examination of said license agreement, it appears that at the time of the execution thereof, said inventions *were not patented*. They formed merely the subject matter of *three pending applications for patents*. At the time of the commencement of the suit only one of said applications had resulted in a patent, to-wit, the Rees patent No. 1,413,135 (R. 28), granted upon application serial number 351,538, the first of the three pending applications enumerated in the license agreement. We are wholly uninformed by the record herein concerning the remaining two applications. As far as can be ascertained from said record, said applications may be still pending or they may have been finally rejected by the Patent Office. Also, the record is wholly silent with respect to the construction, mode of operation or result accomplished by the respective inventions, if any, which were disclosed and described in said applications.

• It is but necessary, in order to apprehend immediately the alarming extent to which justice miscarried in the decree appealed from, to note that despite the undisputed facts stated, the decree entered against the appellants herein provided that:

“The defendants, * * * be and they are and each of them is hereby enjoined and restrained until the further order of this court from making or selling or causing to be made or sold any device or apparatus embodying or containing the inventions described and claimed in and by said letters patent *and in and by said applications for*

several patents, for use in the drying of food substances and in the drying of eatable fruit and vegetables.”

and that:

“Progressive Evaporator Company, Inc., have and recover from the said defendants * * * the profits which the last mentioned five defendants have realized and/or the damage which the Progressive Evaporator Company, Inc., has sustained from and by reason of *the infringement aforesaid*” (R. 92, 93).

The proposition that such an award of an injunction and an accounting for an alleged infringement of mere *pending applications* is entirely contrary to law seems too elementary to require the citation of authorities. However, in view of the fact that the trial court in this regard, as well as in the others herein adverted to, fell into error, it may be well to note in passing some of the leading authorities on the question.

His Honor Judge Gilbert, speaking for this court, has recently declared the law in this respect as follows:

“In *Gayler v. Wilder*, 10 How. 477, 493 (13 L. Ed. 504), Chief Justice Taney said:

‘The inventor of a new and useful improvement *certainly has no exclusive right to it, until he obtains a patent*. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued.’

In *Marsh v. Nichols, Shepard & Co.*, 128 U. S. 605, 612, 9 Sup. Ct. 168, 170 (32 L. Ed. 538), the court said:

‘Until the patent is issued there is no property right in it; *that is, no such right as the inventor*

its use, which is one of the elements of a right of property in anything capable of ownership.’
* * * * *

In *Brill v. St. Louis Car Co. (C. C.)*, 80 Fed. 909, the court said:

‘Manifestly, therefore, there can be no invasion of the patentee’s rights by any manufacture or use of the device, the subject-matter of the expected patent, prior to the date of the patent.’”

Columbia & N. R. R. Co. et al. v. Chandler et al., C. C. A. Ninth Circuit, 241 Fed. 261, 263.

An early case to the same effect is as follows:

“A court of equity has no jurisdiction to enjoin the infringement of an invention before the patent has been issued, notwithstanding an application for the same has been made, and is still pending in the patent office (syllabus by the court).”

Rein et al. v. Clayton et al., 37 Fed. 354.

As stated above, the license agreement under which the plaintiffs claim, granted rights with respect to *three inventions* covered by *pending applications*. The finding of infringement herein is based upon alleged infringement of the inventions disclosed in *two* of said *pending applications*, so that as far as the inventions here in question are involved, the *majority of the relief sought* is with respect to *inventions covered merely by applications* not yet granted. It necessarily follows that insofar as the decree attempts to grant relief with respect to two of the three inventions, namely, those two covered by the pending applications, it is entirely without warrant of law in view of the above authorities and must be reversed.

It should be noted further in connection with the granting of relief for infringement of the *two pending applications* that there is no proof whatsoever of the manufacture, use or sale of any machines embodying the inventions or either of them covered by said applications. In this respect, the record is in the same condition as far as the pending applications are concerned as was pointed out above with respect to the single issued patent, that is, *it is wholly devoid of proof of any act which might constitute the alleged infringement and therefore must be reversed upon this ground as well.*

V. IN AN EQUITY SUIT FOR INFRINGEMENT OF A PATENT THE COURT HAS NO POWER OR JURISDICTION TO AWARD ATTORNEYS' FEES AND THE DECREE APPEALED FROM SHOULD BE REVERSED FOR RESERVING THE RIGHT TO AWARD SUCH ATTORNEYS' FEES TO PLAINTIFFS.

Notwithstanding the fact that the suit before it was an ordinary one in equity for alleged infringement of letters patent (and pending applications), the court below assumed that it had the right or the power to award to the plaintiffs recovery of the fees paid by them to their attorneys for the prosecution of the suit. In the decree it is provided that

“this court also reserves the right upon the coming in of said report to determine the *attorneys' fee*, if any, to which the plaintiffs are entitled, to enter judgment in favor of the plaintiffs for their costs and infringements in this action, including a reasonable *attorneys' fee*” (R. 95).

The above is merely a further illustration of the many respects in which the trial and adjudication

Nothing is more thoroughly established in the practice of litigation pertaining to letters patent than the proposition that the successful party in such litigation is in no case entitled to recover the fees paid his counsel other than the so-called solicitor's docket fee of \$20.00 allowed by statute. The measure of a plaintiff's recovery for infringement of letters patent is fully and specifically determined by the statutory provisions under which such plaintiff derives his sole right to any recovery whatsoever. There is nothing in any of said statutory provisions which lends the slightest support to the award of attorneys' fees made in the above decree. On the other hand, the United States Supreme Court has said that in a suit for infringement of a patent the plaintiff, if successful, *is not entitled* to recover any attorneys' fees.

“A patentee is not entitled to reimbursement for counsel fees paid or expenses incurred by him, other than his taxable costs, nor to interest on the profits realized by an infringer” (Syllabus).

Parks v. Booth, 102 U. S. 96.

Further authority than the case cited above upon such an elementary proposition of law as that here involved is unnecessary. The award of attorneys' fees made by the court below was erroneous and should therefore be reversed.

UPON THEM TO PROVE THAT THE CANCELLATION OF
THE LICENSE TO PROGRESSIVE EVAPORATOR COM-
PANY, INC., WAS INVALID AND OF NO EFFECT.

The entire failure of the plaintiffs, as explained above *to show any infringement of their alleged rights with respect to the three inventions in question*, we submit inevitably requires a reversal of the decree. It is therefore more or less unimportant to consider whether plaintiffs have succeeded or failed in showing any title to the rights so claimed to have been infringed. In other words the situation is substantially the common one in patent suits where no infringement having been shown, the court will decline to consider the questions of either title to or validity of the patent in suit.

In this case, however, it may be worth while to note briefly a few of the plain errors in the adjudication below with respect to the validity of the cancellation of the license under which plaintiffs claim, not only because such errors among others in and of themselves require a reversal, but because such errors confirm the circumstance hereinabove adverted to that the entire adjudication herein and the consequent total miscarriage of justice in this case is largely the result of the fact, admitted in the opinion, that at the time the court below considered and decided the cause, the facts had largely escaped its memory and the record was not referred to to refresh such memory.

A few of the trial court's findings with respect to the question in hand will serve to illustrate such failure to fully apprehend the facts actually disclosed by the record. We here refer to them solely for such purpose of illustration. A complete exposition of the many

this phase of the case and appearing in the opinion and decree of the court below, would require an extended brief on such questions alone. For reasons previously expressed we believe such discussion unnecessary and accordingly will not burden this court therewith.

The license agreement under which plaintiffs claim, provides:

“The third party shall pay to first parties (*Rees and Hine*) *share and share alike*, * * * said royalties on each and every such evaporator equipment” (R. 49).

Said agreement further provides:

“In the event that third party shall fail to keep and perform any of the covenants or conditions herein contained to be kept and performed by him * * * first parties (*Rees and Hine*) shall have the right and option to declare this license agreement abrogated and terminated by serving a written notice to that effect on the third parties, and thereupon this license agreement shall become abrogated and terminated and shall cease and come to an end, and all rights hereby granted and the right of practicing said systems of making and selling said devices shall cease and be terminated solely by the service of said notice” (R. 53).

In finding that the notice of cancellation of said license was invalid and ineffective, so that the license remained in force and plaintiffs had the right to sue, the court said:

“And as royalties accrued to the *Rees* corporation, its was the right to invoke forfeiture, so that notice of forfeiture by *Rees and Hine* goes for nothing. In brief, no forfeiture was effected and the attempt to invoke it failed” (R. 88).

Clearly, under the license agreement *the royalties were due to Rees and Hine* and theirs as licensors, was the right to declare forfeiture for failure to pay such royalties to them. Were it not that the court below has so found, it would be inconceivable that anyone could come to the conclusion that because the *Rees Blow Pipe Manufacturing Company*, a stranger to the agreement had failed to give the notice of cancellation and the licensors *Rees and Hine had done so*, such notice of cancellation was ineffectual. Apparently the court's error in this regard grew out of the fact that it became confused over certain evidence in the record to the effect that the *Rees Blow Pipe Manufacturing Company* for a period of time held the bare legal title to *one* of the *three inventions* covered by the license. The evidence in this regard is quite clear that at all times the entire beneficial interest in said one invention, as well as in the other two inventions covered by the license resided solely in *Rees and Hine*, who were each the owners of an undivided half interest therein (R. 213, 215). Whether or not the legal title to *one* of the *three inventions* covered by the license, namely the one forming the subject matter of the application upon which a patent was granted prior to the bringing of suit, was for a time in the *Rees Blow Pipe Manufacturing Company*, a stranger to the license *certainly cannot change the situation with respect to the other two inventions covered by the license*. With respect to such *two inventions*, the only persons, even according to the court's own theory, who ever had the right to exercise the option to cancel the license agreement were *Rees and Hine*, because *the Rees Blow Pipe Manufacturing Company admit-*

said two inventions. However, in view of the facts in the record showing that said corporation did not even have the beneficial interest in the third invention for which a patent was ultimately granted, the fact remains that Rees and Hine were the sole persons who could validly exercise the right to forfeit the license and that at no time had the Rees Blow Pipe Manufacturing Company any right to exercise such forfeiture with respect to any of said three inventions and particularly with respect to said two inventions in which concededly the Rees Blow Pipe Manufacturing Company, never at any time had any interest whatsoever.

Clearly, under the license, the royalties at all times were payable *solely to Rees and Hine*, and they alone had the right to complain of the failure to pay such royalties and exercise the option to forfeit for such failure, and the record is wholly lacking in any facts to support the conclusion of the court that the Rees Blow Pipe Manufacturing Company was entitled to exercise any such right. It follows therefore that the court below based its conclusion with respect to the validity of the cancellation of the license *upon premises not founded upon facts in the record, and that its decision in this regard was accordingly erroneous.*

Furthermore to hold that Rees Blow Pipe Manufacturing Company and not Rees and Hine was entitled to give notice of cancellation and effect a forfeiture, was in effect to permit the Progressive Evaporator Company, Inc., through which plaintiffs

claim, to deny the title of its licensors Rees and Hine to the inventions in question. The conclusion reached by the court below therefore was not only erroneous on the facts but contrary to law.

“It is urged by the trustee that the claimant was not the real owner of the patents covered by the license. It would be sufficient to point out that the trustee, claiming, as he does, to occupy the position previously held by the bankrupt as licensee under this license, is estopped to deny the title of the licensor. *United States v. Harvey Steel Co.*, 196 U. S. 310, 25 Sup. Ct. 240, 49 L. Ed. 492.”

In re Michigan Motor Specialties Co., 288 Fed. 377, 379.

A further ground upon which the court below found the cancellation by Rees and Hine to be ineffectual was that although admittedly *Rees* and *Hine* had never at any time received *all of the royalties payable to them* under the license agreement, having as the court said received only “about \$4,000.00 and more than *half of the total of and for royalties*” (R. 86), they nevertheless should be held to have received all of such royalties because the Rees Blow Pipe Manufacturing Company had received enough money to pay said royalties and according to the court’s theory Rees and Hine, as officers of the Rees Blow Pipe Manufacturing Company *should have deprived said corporation, the Rees Blow Pipe Manufacturing Company* of some of said monies and applied the same to the payment of royalties due to the *individuals Rees and Hine* in order to prevent said royalties from becoming in arrears. In this the court wholly overlooked the fact that the Progressive Evaporator Company, Inc.,

nevertheless in control of Lombard, the President of said corporation at the time the majority of the royalty payments in question should have been made. *It entirely overlooked the fact that Lombard is the one complaining that payments made were not applied to payment of such royalties, and attempting to show on that ground, the alleged invalidity of the cancellation of the license.* It entirely overlooked the fact that the gravamen of the contention with respect to such cancellation is that monies paid out by *Progressive Evaporator Company, Inc.*, were not properly applied to the payment of royalties so that the royalty account was in arrears and rendered the license subject to cancellation. It entirely overlooked the fact that *Lombard, being in charge of the affairs of said Progressive Evaporator Company, Inc., as its president during the times when the majority of the royalty payments became due had the power and not only the power but the right and the duty to see that all payments made by the company of which he thus was in control was so applied and so credited by the persons receiving the same that none of the rights of the corporation should be jeopardized or endangered.* In other words, it was the obvious duty of Lombard, by virtue of his position as president of the *Progressive Evaporator Company, Inc.*, to insist that any payments made by said company for royalties due under the license agreement be specifically made to the persons entitled thereto under said agreement and to no one else. Similarly it was his duty to see that such persons should give a good and sufficient receipt and release

for the *payment of such royalties* in order to avoid all possibility of cancellation of the license. *All of this was entirely overlooked by the lower court.*

Although Lombard is the one complaining of the failure of the recipient of monies paid by Progressive Evaporator Company, Inc., to apply the same to the discharge of royalties *he is the very person, and the only person* who at the time such payments were made, *had the absolute power to control the application of such monies and the absolute power to refrain from paying any money whatsoever unless the same was paid to the only persons entitled under the license agreement to give a valid acquittance for the payment of such royalties.* Lombard, however, *was negligent in this duty.* He paid no attention whatsoever to these matters. He made no effort whatsoever to see that any monies paid out by the Progressive Evaporator Company, Inc., were first applied to the payment of royalties. He was fully cognizant of the terms of the license agreement and of the importance of seeing that such payments were properly made in order to avoid the possibility of a forfeiture. His training as an attorney at law made him fully capable of entirely understanding and realizing this necessity. There is not a shred of evidence in the record to show that he ever exerted himself in the slightest in this regard. How then can he be heard at this time to complain that the recipient of the monies from the Progressive Evaporator Company, Inc., should have performed what was primarily his duty, and that because of its failure, to wit, the failure of the Rees Blow Pipe Manufacturing Company, a stranger to said agreement, to make such

nevertheless in control of Lombard, the President of said corporation at the time the majority of the royalty payments in question should have been made. *It entirely overlooked the fact that Lombard is the one complaining that payments made were not applied to payment of such royalties, and attempting to show on that ground, the alleged invalidity of the cancellation of the license.* It entirely overlooked the fact that the gravamen of the contention with respect to such cancellation is that monies paid out by *Progressive Evaporator Company, Inc.*, were not properly applied to the payment of royalties so that the royalty account was in arrears and rendered the license subject to cancellation. It entirely overlooked the fact that *Lombard, being in charge of the affairs of said Progressive Evaporator Company, Inc., as its president during the times when the majority of the royalty payments became due had the power and not only the power but the right and the duty to see that all payments made by the company of which he thus was in control was so applied and so credited by the persons receiving the same that none of the rights of the corporation should be jeopardized or endangered.* In other words, it was the obvious duty of Lombard, by virtue of his position as president of the Progressive Evaporator Company, Inc., *to insist that any payments made by said company for royalties due under the license agreement be specifically made to the persons entitled thereto under said agreement and to no one else.* Similarly it was his duty to see that such persons should give a good and sufficient receipt and release

for the *payment of such royalties* in order to avoid all possibility of cancellation of the license. *All of this was entirely overlooked by the lower court.*

Although Lombard is the one complaining of the failure of the recipient of monies paid by Progressive Evaporator Company, Inc., to apply the same to the discharge of royalties *he is the very person, and the only person* who at the time such payments were made, *had the absolute power to control the application of such monies and the absolute power to refrain from paying any money whatsoever unless the same was paid to the only persons entitled under the license agreement to give a valid acquittance for the payment of such royalties.* Lombard, however, *was negligent in this duty.* He paid no attention whatsoever to these matters. He made no effort whatsoever to see that any monies paid out by the Progressive Evaporator Company, Inc., were first applied to the payment of royalties. He was fully cognizant of the terms of the license agreement and of the importance of seeing that such payments were properly made in order to avoid the possibility of a forfeiture. His training as an attorney at law made him fully capable of entirely understanding and realizing this necessity. There is not a shred of evidence in the record to show that he ever exerted himself in the slightest in this regard. How then can he be heard at this time to complain that the recipient of the monies from the Progressive Evaporator Company, Inc., should have performed what was primarily his duty, and that because of its failure, to wit, the failure of the Rees Blow Pipe Manufacturing Company, a stranger to said agreement, to make such

and *Hine* have been deprived of their right to effect a forfeiture for the failure to pay royalties?

It is thus apparent that the court below took an entirely opposite view of the situation from that actually presented by the record. That it did so because of lack of recollection of what the record discloses is the only conclusion which can be drawn particularly in view of the statements concerning such recollection appearing in the opinion itself. During the trial the court itself indicated that the duty was upon Lombard, as president of the corporation to safeguard the interests of the Progressive Evaporator Company, Inc., by giving his attention to the method employed in paying royalties. Thus the court said, referring to Lombard:

“Very well. I don't see any necessity of any time being devoted to this particular matter. *This witness (Lombard) was admittedly president, then, and if he did not get the statements, it was not the fault of these defendants, I assume*” (R. 169).

Very evidently the force of the situation, clearly realized by the judge at the time of the trial, was entirely lost by him at the time of rendering the decision.

The conclusion to be drawn from the foregoing discussion is quite evident. The principal plaintiff in this suit is Lombard, president of the Progressive Evaporator Company, Inc. With respect to the question of forfeiture of the license his sole complaint is that Rees and Hine *as officers of the Rees Blow Pipe Manufacturing Company* having failed to

take money received by that company in payment of obligations owing to it for material, and apply the same to the payment of royalties owing to them *as individuals* under the license agreement, they are precluded from availing themselves of the remedy afforded them by the license agreement for failure to pay such royalties. In view of the fact recognized by the court below that Lombard, the president of the Progressive Evaporator Company, Inc., was in control and in charge of the affairs of said company *and was the one person who could conclusively determine how the monies of said company should be paid out and therefore the one who could have insisted upon seeing that monies so paid out were paid out only in discharge of royalties*, the absurdity of placing the burden of proper application of the funds paid out by Progressive Evaporator Company, Inc., upon *Rees and Hine, rather than upon Lombard, having the powers and rights and duties above stated*, is most apparent. A more complete subversion of justice than this cannot readily be imagined. *To hold, as was held by the court below is to permit a person to profit by his own neglect and wrong doing. Surely one who by his own acts not only could but should have avoided circumstances leading to the situation which he complains of, should not be heard to contend that others are liable to him for the consequences of such neglect*, even if it were the fact that such others could in some way have averted the damage by their own acts. This however, is the very gist of the plaintiff Lombard's position in this suit, and it is submitted that for this reason alone, as well as the others hereinabove

in this case.

It would require a voluminous and extended brief to point out all of the remaining errors both of fact and of law in the opinion and decree appealed from herein, insofar as the same relate to the alleged invalidity of the cancellation of the license agreement. For reasons hereinabove pointed out, we believe it entirely unnecessary to burden this court with such a discussion. By so limiting such discussion, however, we do not in any way waive or relinquish our insistence that for all of such grounds as well as those specifically referred to the decree should be reversed.

VII. CONCLUSION.

It is respectfully submitted that the plaintiffs have failed to sustain the burden to prove either infringement or any right to maintain this suit, and that for said reasons and the other errors of law hereinabove pointed out, the decree should be reversed with directions to dismiss the bill of complaint.

Dated, San Francisco,
May 4, 1927.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),
Defendants-Appellants,

vs.

NORMAN LOMBARD, MONTGOMERY FLYNN, WIL-
LIAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lom-
bard, Elizabeth Lombard and Norman
Lombard, Junior,
Plaintiffs-Appellees.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES.

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES.

During argument the court asked about certain propositions not touched upon by counsel for defendants in their opening brief and therefore only incidentally referred to by us in our points and authorities. For this reason and in order to cite authorities in support of these propositions we asked leave to file this supplemental brief.

As this action is one on behalf of a corporation, an exclusive licensee of a patented device, to restrain the violation of that license by the patentees who are the licensors, has the federal court jurisdiction? Is this not a suit for the violation of a license agreement and not for the infringement of a patent? This was one of the propositions referred to by the court on the argument.

The general rule is that the licensee cannot sue for infringement and that he has no standing in the federal court in an infringement suit.

Gayler v. Wilder, 10 How. 477;

Paper Bag Mach. cases, 105 U. S. 767;

Birdsell v. Shaliol, 112 U. S. 485.

There is an exception to the foregoing rule. The case at bar comes within this exception. The exception is the case where the patentees and licensors are themselves the infringers of a patent and then the federal court has jurisdiction of an action for such infringement brought by the licensee or by a stockholder on behalf of the licensee as in this case. Counsel realized this rule so he did not attack the federal court's jurisdiction on this ground.

The case of *Littlefield v. Perry*, 21 Wall. 221, is the leading case in support of this exception. There the defendants attack the jurisdiction of the federal court on the ground that the Act of Congress giving the federal courts exclusive jurisdiction of actions involv-

ing patents did not give the licensee the right to sue the patentee in the federal court for violation of the license agreement and the consequent infringement of the patent. It was claimed that this was merely an action on a contract and that the federal court had no jurisdiction. In answer to this contention the court said (pp. 222, 223):

“But even if they are not technically assignees, we think this action is, nevertheless, maintainable. They certainly had the exclusive right to the use of the patent for certain purposes within their territory. They thus held a right under the patent. The claim is that this right has been infringed. To determine the suit, therefore, it is necessary to inquire whether there has been an infringement, and that involves a construction of the patents. The act of Congress provides ‘that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, in the Circuit Courts’, etc. An action which raises a question of infringement is an action arising ‘under the law’, and one who has the right to sue for the infringement may sue in the Circuit Court. *Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case.*

A mere licensee cannot sue strangers who infringe. In such case redress is obtained through or in the name of the patentee or his assignee. Here, however, the patentee is the infringer, and as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name. A court of equity looks to substance rather than form. When it has jurisdiction of parties it grants

they come as plaintiff or defendant. In this case the person who should have protected the plaintiff against all infringements has become himself the infringer. He held legal title to his patent in trust for his licensees. He has been faithless to his trust, and courts of equity are always open for the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction." (Italics ours.)

It is interesting to note that in the *Littlefield* action the patentees endeavored, as the defendants have in the present case, to excuse their infringement and violation of the license agreement on the ground that the licensee had forfeited its license by failure to comply with its terms. The court in answer to this claim applied the same equitable principle which Judge Bourquin applied in his decision in this case and which we are invoking, as a complete answer to the defendants' claim that the corporation had forfeited its license. This principle is: that before defendants could declare a forfeiture of the license they were required to give the corporation a reasonable notice of default and an opportunity to comply with the contract, (assuming there had not been such compliance) which they never did (see p. 42 of plaintiffs' brief). In this respect the court, in *Littlefield v. Perry*, said (p. 227):

"There is no proof that the royalty on the stoves made and sold before the action was commenced was sufficient to discharge that part of the debt due from Littlefield to Treadwell & Perry, which was first to be paid out of it before any-

thing was payable to him, and there could be no forfeiture for a neglect to make and sell, until after reasonable notice of the default. No such notice is proven or even claimed." (Italics ours.)

The rule of *Littlefield v. Perry*, that a licensee may sue in the federal court where the patentee and licensor is the infringer is followed in many cases.

See: *Waterman v. MacKenzie*, 138 U. S. 252, see p. 255, where it is said:

"In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone unless that is necessary to prevent an absolute failure of justice, *as where the patentee is the infringer, and cannot sue himself.*" (Italics ours.)

See: *Rapp v. Kelling*, 41 Fed. 792, where it is said:

"Even if the instrument did not vest the complainant with the legal title of the patent, it enables him to maintain a suit in his own name against the patentee for an infringement. *Littlefield v. Perry*, 21 Wall. 205; *Gayler v. Wilder*, 10 How. 477. The bill is in the ordinary form of one brought by the owner of a patent against an infringer for an injunction and an accounting. The case which it makes differs from ordinary actions for infringement only in the fact that the defendant is the person to whom the patent was originally granted. The bill, therefore, presents a controversy of which this court has jurisdiction, and, *even though one issue which may be raised in the case is whether the grant is still in force, that circumstance does not prevent the controversy from being one arising under the laws of the United States.* But although the complainant may have failed to comply with some of the terms of

was acquired, his failure to perform them *does not work a forfeiture of the grant, and the only remedy of the defendant is an action for damages for breach of contract.*" (Italics ours.)

(Here again we note the court's refusal to allow a forfeiture of a license agreement on some technical pretense of non-performance.)

See also:

Brush Electric Co. v. Cal. Electric Co., 52 Fed. 945;

Excelsior Wooden Pipe Co. v. Pac. Bridge Co., 22 Supreme Court Rep. 681.

The last mentioned case is very much in point. The situation there involved was practically the same as that here as far as the infringement of the patent was concerned. That was an action by a licensee against his patentee for infringement of the patent. The licensee held an exclusive license and claimed that the patentee was manufacturing and selling wooden pipe embodying the patented device and invention. The action was brought to recover damages for infringement and for an injunction. Practically the same defense was made there as was made here in the lower court. It was denied that the license was a subsisting one. It was claimed that the rights thereunder had been forfeited and consequently cancelled by the patentees of the license.

It was claimed that the federal court had no jurisdiction because there was no question of a patent right involved as the answer merely raised the issue

of the validity of the license. The lower court held that the action was not one arising under the patent laws but solely on a contract. The upper court reversed this decision and held that the title of the licensee in the patent was involved as the validity of the license was called into question. The court held there that the United States court had jurisdiction of the cause and that its jurisdiction was exclusive. The court then said (pp. 683, 684):

“The answer raises no issue as to the validity of the patent, or as to the acts charged as infringement. *It admits the license, but denies that it is a subsisting one, and pleads abandonment of the same by plaintiff, a forfeiture of all rights thereunder by failure to comply with its terms and conditions, and by acts of gross bad faith towards the patentee by seeking to defeat the patent, and a revocation of the license by Allen.* It will be observed that the answer raises no question of the construction of the license, but merely of its existence,—that is, of the title of the plaintiff to sue. Before deciding that these allegations oust the jurisdiction of the court it must at least appear that the plaintiff has another remedy by an action in a state court. But what remedy has it? * * * There were practically but two ways in which the patentee could impair the grant he made to the licensee, and those were by a revocation of the license by a bill in equity, *or by treating it as abandoned and revoked, and granting a license to another party.* He elected the latter remedy, and made a contract with the Pacific Bridge Company to make and sell wooden pipe within the same territory. *A suit in a state court would either be inadequate or would involve questions under the patent law.* If the licensee sued at law he would be obliged to establish the fact that the patent had been infringed, which the patentee might have denied and in any case could

sued in equity he could only pray an injunction against future infringements; but this is exactly what he prays in this case, and thereby raises a question under the patent laws. In either case the patentee could defeat the action by showing that he did not infringe,—in either case the defendant could so frame his answer as to put in issue the title, the validity, or the infringement of the patent.

The natural and practically the only remedy, as it seems to us, was for the plaintiff to assert his title under the license, and to prosecute the defendants as infringers. In doing this he does what every plaintiff is bound to do: namely, set forth his title either as patentee, assignee, or licensee, and thereby puts that title in issue. The defendant is at liberty in such a case to deny the title of the plaintiff by declaring that the license no longer exists, but in our opinion this does not make it a suit upon the license or contract, but it still remains a suit for the infringement of a patent, the only question being as to the validity of plaintiff's title. There can be no doubt whatever that if the plaintiff sued some third person for an infringement of his patent, the defendant might attack the validity of his license in the same way, but it would not oust the jurisdiction of the court. Why should it do so in this case?" (*Italics ours.*)

This case is also conclusive on another proposition suggested at the argument, to wit, whether or not the fact that other questions were involved in this action besides the infringement of a patent ousts the court of its jurisdiction. This case also held that the federal court was not deprived of its jurisdiction because the action might involve other matters besides the in-

fringement of a patent. On this point we will, a little later on, quote further from this case.

Accordingly we see that as the license involved here included the right to use a patented device and as the complaint charged that the defendants, the patentees and licensors were infringing this patent, this case falls squarely within the rule of *Littlefield v. Perry*, supra, and the other cases above cited and the federal court has jurisdiction of this action.

AS THE FEDERAL COURT OF EQUITY HAD JURISDICTION OF THE ACTION BECAUSE IT INVOLVED THE INFRINGEMENT OF A PATENT IT HAD JURISDICTION TO GRANT COMPLETE RELIEF TO THE PLAINTIFFS INCLUDING THE RESTRAINT OF THE VIOLATION OF THE LICENSE AGREEMENT IN ALL RESPECTS.

It cannot be claimed in view of the decisions that the fact that the plaintiffs in addition to seeking relief from the infringement of the patent also ask relief against the violation of the license agreement in other respects ousts this court of its jurisdiction. The decisions hold that the court is not deprived of its jurisdiction by reason of the existence of other questions beside the question of the infringement of the patent.

See: *Excelsior Wooden Pipe Company v. Pacific Bridge Co.*, supra. There the court in addition to that which has already been quoted goes on to say:

“We held in *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62, with respect to an action in a state court, which involved the question whether the patents were

that this did not necessarily oust the state court of its jurisdiction; and by parity of reasoning we hold in this case that the mere fact *that the suit may involve the existence of the license does not oust the court of jurisdiction of a suit for the infringement of a patent.*" (Italics ours.)

It is interesting to note that the Supreme Court, in this opinion, in the part quoted on page ~~7~~—hereof, holds that if the licensee cannot come into this court and ask for a remedy against infringement and also against the violation of his license agreement he is without an adequate remedy. In other words it is only in the federal court that the licensee has an adequate remedy to protect himself not only against the violation of his license agreement but to give him complete relief against infringement.

On the same point, see *Henry v. A. B. Dick & Co.*, 32 Supreme Court Rep. 364, 367. This case was later overruled but not on the point respecting jurisdiction. There the court in quoting *Littlefield v. Perry*, supra, said:

"An action which raises a question of infringement is an action arising 'under the law'; and one who has the right to sue for the infringement may sue in the circuit court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved, it carries with it the whole case." (Italics ours.)

It is to be noted that the court says that "if the patent is involved (*as it is in the case at bar*), it carried with it the whole case" and gives the federal

court the right to afford the aggrieved party complete relief. As long as the question of an infringement is raised by the complaint the action is one arising under the patent law.

See: *Healy v. Sea Gull Specialty Company*, 35 Supreme Court Rep. 658. Here again the plaintiff was the licensee and the defendant the patentee and licensor. The defense was the same as the one interposed in this case that the license had been terminated by a breach of its conditions. The bill prayed for an injunction and for damages for an infringement. The lower court thinking the matter merely involved a contract dismissed the bill for lack of jurisdiction. The Supreme Court said:

“The bill prays for an injunction against making, using, or selling the boxes or machines, for an account of profits received by reason of the infringement, for triple the damages measured as above stated, and for the surrender of the machines. The jurisdiction depended upon this being a case arising under the patent laws, and the district court, thinking that it was merely a matter of contract, dismissed the bill. In our opinion its decision was wrong. * * * *The plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the district court for infringement of a patent, unless the claim is frivolous or a pretense, the district court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes.* *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 46 L. Ed. 910, 22 Sup. Ct. Rep. 681. Jurisdiction generally depends upon the case made and relief demanded by the plaintiff; and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense contained in what used to

be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied.

As appears from the statement of it, the plaintiff's case arose under the patent law. It was not affected by the fact that the plaintiffs relied upon a contract as fixing the mode of estimating damages, or that they sought a return of patented machines to which, if there was no license, they were entitled. These were incidents. The essential features were the allegation of an infringement and prayers for an injunction, an account of profits, and triple damages,—the characteristic forms of relief granted by the patent law. The damages were grounded on the infringement, and the contract was relied upon only as furnishing the mode in which they should be ascertained.” (Italics ours.)

See, also, *Lockett v. Delpark*, 46 Supreme Court Rep. 397. The last mentioned case contains a comprehensive summary of the jurisdiction of the federal court in infringement suits and there it is said (400):

“It was held that the patentee might waive the contract and sue on the tort of infringement, that jurisdiction must depend on the remedy it chose and sought in its bill, and that, as the patentee had neither sued on the broken contract of license nor asked to have it forfeited by the court, *the jurisdiction under the patent laws was not ousted.* * * * The result of these cases is that a federal district court is held to have jurisdiction of a suit by a patentee for an injunction against infringement and for profits and damages, even though in anticipation of a defense of a license or authority to use the patent, the complainant includes in his bill averments intended to defeat such a defense. If these averments do not defeat such defense, the patentee will lose his case on

the merits, but the court's jurisdiction under the patent laws is not ousted." (Italics ours.)

Thus it will be seen that the fact that the bill of complaint asked for an injunction restraining the violation of the license agreement in other respects besides the infringement of the patent did not oust the court of jurisdiction and the court made no error in restraining all other violations, by the defendants or the license agreement, as well as the infringement of the patent.

As the federal court had jurisdiction to prevent the infringement of the patent by the defendants it could also enjoin the violation of the license agreement in all other respects by the defendants. It could prevent them from granting a similar license agreement to Neal and Ward or to anyone else and from carrying out or attempting to carry out such similar license agreement. It could restrain the use of an invention by the licensor covered by the license agreement upon which the patent had been applied for but not yet issued. It could in other words grant a complete relief once it had acquired jurisdiction. This is the general rule and is well stated in 21 *Corpus Juris*, p. 134, where it is said:

"G. Retention of Jurisdiction to Afford Complete Relief. 1. General Rule. It is a well settled rule that a court of equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief."

See, also, *McGowan v. Parish*, 35 Sup. Ct. Rep. 543, p. 548, where it is said:

completely, and not by halves'; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority." (Italics ours.)

See also:

Camp v. Boyd, 33 Sup. Ct. Rep. 785, see p. 793.

Opposing counsel claimed in his opening brief that the court in this action had no right to restrain the defendants as licensors from infringing an invention upon which an application for a patent had been filed, but which patent had not yet issued. In answer to this proposition we pointed out on pages 32 to 35 of our brief that the defendants had given an exclusive privilege and contract to use this invention and that they could not violate that exclusive privilege and contract irrespective of whether a patent had issued or not and if they attempted to violate it they could be restrained by a court of equity irrespective of the patent question on the ground that they were violating an exclusive privilege given by themselves. At the argument counsel attempted to meet this conclusive answer by the claim that it was not shown what invention the application for a patent embraced. This would make no difference. The defendants by their answer (R. 78) admit that after attempting to cancel the license of the corporation they granted a similar license to Neal and Ward. The allegation in their answer is as follows:

"Said Rees and Hine entered into a license agreement with said Neal and Ward similar to

The license agreement executed and delivered by them to said Progressive Evaporator Company, Inc., which latter agreement is referred to in plaintiffs' bill of complaint."

It was admitted by them at the trial that not only had they granted this license to Neal and Ward but Neal and Ward at the time of the commencement of this action were actually operating under this license agreement which means that they as the new licensees of the defendants Rees and Hine and in privity with Rees and Hine were violating the license agreement held by the corporation in all particulars. In other words we have an agreement to violate and the actual admission of the continued performance of that agreement to violate. The court is justified therefore in restraining such violations and restraining all acts constituting such violations irrespective of whether or not it was shown what invention the particular application for a patent described in the license agreement embraced.

It was shown at the trial that not only had defendants entered into a license agreement with Neal and Ward which required them to violate the license agreement given the corporation but also the Rees Blow Pipe Mfg. Co., under their control entered into a manufacturing agreement with Neal and Ward which required it to violate the license agreement. It was made plain to the court that these agreements had been made, the carrying out of which would have required the defendants to violate in all respects the license held by the corporation. It was shown without conflict that the defendants were en-

gaged in carrying out these agreements. The court of necessity is therefore required to enjoin this complete violation of the license held by the corporation and it was therefore unnecessary to show the nature of the inventions embraced within the applications for patents to entitle the plaintiffs to such an injunction. The defendants admitted agreeing to violate the license in all respects and so doing and the court could enjoin them from continuing to do so without any proof as to the nature of the inventions covered by the applications for patents. Such proof under the circumstances would have been an idle and useless thing and would have served merely to encumber the record. Once it was called to the attention of the court that the defendants were violating the license agreement which they had given the corporation it could restrain them from doing so in any respect without a specific and detailed inquiry into the mode and operation of the device manufactured. The decree merely restrains them from violating the license and the inventions described in the applications for patents referred to in the license agreement. *If they were infringing these inventions, as their agreement required them to do, it was the duty of the equity court to restrain them. If they were not infringing these inventions they are not harmed by the injunction of the court, which merely restrained them from such infringement.*

As we pointed out in our opening brief, pages 8-10 and 32-35 thereof, the corporation was entitled to protection against the violation of its license by the defendants who were its licensors and at the same

time its officers and directors irrespective of whether or not there was an infringement of patent involved. The fact that there was an infringement of patent involved, as we see from the foregoing cases, made it necessary that the action be brought in the federal court. The fact that there were other respects in which the license agreement was violated besides the infringement of a patent did not oust the court of jurisdiction. On the contrary as it had jurisdiction by reason of the fact that an infringement of the patent was involved it could grant complete relief to the aggrieved party as far as every violation of the license agreement was concerned.

**PAYMENT OF ROYALTIES BY NEAL AND WARD TO REES
AND HINE WERE FOR MANUFACTURE AND SALE OF
THE PATENTED DEVICE.**

Counsel's main point urged in his brief was that there was no proof of infringement of the patented device. In our brief we show that the defendants had given to Neal and Ward a license agreement to manufacture and sell this patented device describing *it by its application for patent number*, that they had made a manufacturing agreement with Neal and Ward to manufacture the patented device described in the license agreement, again referring to it by its patent number, that Neal and Ward during the year 1923 had sold 50 of these devices, described in the said license and manufacturing agreements, and in addition to all this, *that Neal and Ward paid to Rees and Hine royalties during the year 1923 for the manu-*

franchise and sale of the device described in the license agreement and manufacturing agreement and designated "evaporators". *The book in which the payment of these royalties was entered was exhibited to this court at the argument. The payment of royalties is conclusive proof of the making and selling of the patented device.* Counsel in his closing argument in an attempt to escape from the effect of the payment of these royalties claimed that it did not appear whether these royalties were paid for the manufacture and sale of the patented device or of the devices covered by the application for patents which had not yet been issued which are also described in the license agreement.

The absurdity of this argument may be seen by an examination of the license agreement in connection with the letters patent. The license agreement (R. 95), given the corporation refers to three applications for letters patent of the United States, to wit:

Application Serial No. 351,538, filed January 15, 1920 for Drying Apparatus;

Application Serial No. 429,298, filed December 9, 1920 for System for Drying Substances;

Application Serial No. 408,703, filed September 7, 1920, for Radiator for Drying Apparatus.

Application Serial No. 351,538 was granted on April 18, 1922 and Letters Patent No. 1,413,135 were issued. (These Letters Patent and the device covered thereby are set forth in full from pp. 28-35 of the Record, copy thereof was attached to the complaint and was admitted by the answer.) The other two applications were not granted at the date of the commencement of

the action. The license and manufacturing agreements given Neal and Ward were similar to those held by the corporation (R. 317-318, see quotation therefrom p. 23 of our brief). By examining the license agreement of the corporation we can determine what this royalty embraced which was paid by Neal and Ward. The license agreement of the corporation provides as follows (R. 108):

“a. On each and every such *evaporator equipment*, made by the Rees Blow Pipe Manufacturing Company, Inc., for the Third Party and sold by such Third Party, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof.”

Accordingly the royalty paid by Neal and Ward under a similar license agreement was for the truck capacity of evaporator equipment manufactured by the Rees Blow Pipe Mfg. Co., for Neal and Ward. Now the license agreement provides of what this truck capacity shall consist, paragraph 8, Record 107 says:

“For the purposes of this agreement, the capacity of one truck is understood and deemed to be forty-four 3'x6' or 3'x8' standard field trays or their equal in capacity.”

Now the specifications for Letters Patent (R. 32-35 inclusive), say in part:

“My invention relates to devices for drying fruit and other products.

An object of the invention is to provide a dryer giving a dried product of even moisture content.

Another object of the invention is to provide a drier in which a continuous succession of fruit or other material may be economically dried.”

which a succession of *trucks* loaded with *trays* shall pass. For instance they say:

“*Figure 4 is a plan view of the truck on which the trays are piled in two tiers. Figure 5 is a side elevation of the truck loaded with trays.*”

They then describe the method by which the trucks and trays are fitted into and pass through the drying chamber. *Constantly throughout the specifications they refer to these trucks and trays as an integral part of the device.* For instance in the twelfth and last claim the specifications read in part as follows (R. p. 35):

“Means for controlling the leakage of air currents between the successive tiers *and below the trucks*, and means for causing a gradual progression of the mass of air in said air currents longitudinally through through said drying chamber and *the succession of tiers of trays therein.*”

The drying apparatus covered by the Letters Patent is an evaporator designed to receive *trucks* loaded with *trays*. Its capacity depends on the *trucks* it will hold. Its volume and size is measured by its *truck capacity*. A small evaporator has a four truck capacity, a larger one seven or ten. Now the royalty paid by Neal and Ward was \$55.00 a *truck capacity* of an evaporator. *The amount of the royalty was measured by the very same standard, to wit, a TRUCK by which the volume and size of the patented device, to wit, an evaporator was measured.* The inference that the royalty applied to the patented device is irresistible. It is the only inference that can be drawn.

To say that the royalty paid by Neal and Ward was not paid on the patented device is absurd and is ignoring the dictates of common sense. There is no showing that this royalty paid by them was for anything else but for the manufacture and sale of the patented device *by the standard of size of which the amount of the royalty is measured.* *The evidence is absolute, uncontradicted and complete that Neal and Ward at the time of the commencement of this action were manufacturing and selling the patented device and were paying royalties to Rees and Hine for the privilege of so doing and this conclusively establishes infringement even if it was not admitted by the pleading and conceded at the trial.*

**DEFENDANTS CONCEDED INFRINGEMENT AT THE TRIAL
OF THE ACTION.**

In our brief, pages 15 to 21, and at the argument we showed that the case was tried on the theory that the defendants were making and selling the patented device but that they had an absolute right to do so because the corporation had no existing license having lost it by cancellation. This was the theory of the defense. This is why they admitted in their pleadings (R. 78), that they had given another license to Neal and Ward. This was the defense made in the cases of

Littlefield v. Perry, supra;

Rapp v. Kelling, 41 Fed. 792;

Henry v. Dick & Co., 32 Sup. Ct. Rep. 364;

Excelsior Wooden Pipe Co. v. Pacific Bridge Co., supra.

In each of these cases the defendants took the position that the plaintiff's claim no longer existed and therefore they committed no infringement by manufacturing and selling the patented device. As the court said in the last mentioned case:

“In short THE ONLY DEFENSE WAS *a denial of the license which lies at the basis of the plaintiff's suit and constitutes its title to the patent.*”

This language could be applied without change to the case at bar and to the theory upon which it was tried. Now in answer to our position in this respect counsel makes the astonishing assertion that defendants were not required *by the slightest intimation* to make it known to the trial court at the trial of the case that they considered one of the issues to be tried was whether or not there had been a manufacture and sale of the patented device. They say that as plaintiffs' counsel in his opening statement said nothing about showing a manufacture and sale, defendants' counsel in his statement was not required to mention it. In view of what occurred at the trial this is indeed an astounding claim. If counsel is right then a litigant may mislead a court and the opposing parties by his acts and statements at the trial and then if he loses take advantage of his deception on appeal.

Counsel for defendants at the trial was not asked what his answer was to plaintiffs' opening statement. He was asked *what the issue was that was going to be tried*. Mr. Barry (counsel for defendants), Record 120, said:

“Mr. BARRY (counsel for defendant): Does your honor wish any statement from the defense?”

THE COURT. *You can make it if you want to. I think perhaps you had better. We want to know what the issue is that we have to try here.*

It was incumbent upon counsel for defendants to speak then. If he claimed they were not manufacturing and selling he should have then said so. He did not. On the contrary he said there was only one issue and that was the validity of the license. His concluding statement is (R. 124):

“So that the real issue in controversy here is, first, were the royalties paid, and, second, were the royalties paid at the time that the notice of cancellation was given?”

He never claimed by the slightest motion that there was no manufacture or sale. This was conceded. It had occurred. It was not in issue. To attempt now to put it in issue is the vainest sort of trifling. To say, that when a court asks *a defendant litigant what the issues in controversy are and he states that there is only one issue in controversy and proceeds to try and argue the case on that theory*, that on appeal he may say that there was another point on which he took issue but *it was not incumbent upon him to say so is little short of ridiculous.*

This case was exhaustively briefed by both sides after the trial in the lower court (R. 400). Every point upon which defendants relied was fully stated in these briefs. These briefs are on file and reference is made to them. Not only during the trial was no claim made that there was any issue as to manufacture and sale *but there was not a syllable in the comprehensive briefs of defendants which intimated*

the subject.

PLEADINGS ADMIT MANUFACTURE AND SALE OF THE
PATENTED DEVICE.

In our opening brief, pages 11 to 15, we show that the pleadings admit the *manufacture and sale* of the patented device by defendant, but deny that such manufacture and sale is in *violation of the corporation's rights*. Nowhere in the answer is the manufacture and sale absolutely and unequivocally denied. Therefore plaintiffs were not required to prove it.

See, *Jordon v. Wallace*, 13 Fed. cases 1104, quoted on page 14 of brief. But not only does the answer not deny the manufacture and sale but it practically alleges it. It alleges that a similar license to the one held by the corporation had been given Neal and Ward. This allegation is tantamount to alleging manufacture and sale *but what is more it shows that there was never any intention on the part of defendants to deny the manufacture and sale and it shows that the whole theory of their defense was a denial of the validity of the corporation's license.*

Counsel on the argument claimed that the denial in the answer (R. 79), that

“Rees, Hine and Neal had *violated said rights secured by the patents or the interests of the corporation to said patents created by said license agreement,*”

is a denial of the manufacture and sale of the patented devices. This denial is nothing *but the denial of a conclusion of law*. It is not a denial of the fact of

manufacture and sale. It is perfectly *consistent* with the theory of the defense that they were making and selling the patented device but this was not in violation of any rights of the corporation because it had forfeited such rights. So defendants can take cold comfort from this denial. *The fact remains that the manufacture and sale is intentionally not denied by the answer.*

LOMBARD DID MAKE PROVISION FOR ROYALTIES.

It is claimed that it was Lombard's fault the license was not protected. This claim is based upon the testimony of Lombard that when the corporation delivered notes or cash to the defendants nothing was said about how it should be applied. These deliveries were made in October, 1922, and prior thereto. It was not necessary for anything to be said. There was an understanding with Hine that the defendants would take long time notes in payment of royalties, and they received such notes and applied them to royalties. See Hine's testimony (R. 190):

*"As I put it once before, we would take the long-term notes as payment on the royalties * * **
(R. 194.)

Q. *You did make some division of certain notes that you had?*

A. Yes, sir.

Q. What were those notes?

A. I cannot tell you.

Q. And you made a division of them on account of royalties, did you not?

A. *Yes, because we had that discussion with Mr. Lombard previous to that time."*

carrying it out *Lombard had taken care of the royalties* and there was nothing more to be said when delivering the notes to defendants. Furthermore, Lombard could not protect the corporation after his ouster on November 1, 1922. After that he could do nothing toward paying the royalties, if they were not already paid. The defendants could have done something but failed to do so because they planned to cancel the license. Furthermore any dereliction of Lombard could not excuse the defendants violation of the trust imposed upon them as directors of the corporation. Any fault of his could not excuse their flagrant breach of trust or their illegal cancellation of the license. The corporation was entitled to a reasonable notice of forfeiture and a reasonable opportunity to comply with its agreement. No act of Lombard's could excuse the defendants' failure to give the corporation such notice or opportunity and no act of Lombard's could make the cancellation of the license, without such notice and opportunity, valid.

BILL OF COMPLAINT SHOULD NOT BE DISMISSED.

Assuming that the manufacture and sale of the patented device was not admitted by the pleadings and was not conceded at the trial and that the case was not tried on that theory and that there was no evidence of infringement in spite of the two agreements with Neal and Ward, the sale of evaporators thereunder by them and the payment of royalties by them to Rees and Hine for the manufacture and sale of

these evaporators, counsel then argues that this court should enter a decree dismissing this bill. He contends that it is the inexorable rule of this court in a case of this character that it cannot be sent back to the trial court for further evidence on the question of infringement but must be forthwith summarily dismissed by this court. Before referring to the cases cited by counsel which he claims are in support of this contention but which in fact are not in point at all we desire to call this court's attention to the general rules on the subject.

The rule is that the appellate court will not remand a case to the lower court for further evidence *if justice does not demand it or if it is clear that all the evidence available on the question at issue was introduced.* But where justice does demand it or where it is obvious that the proof on a particular proposition is manifestly defective or inadequate for one reason or another and that further proof is available then and in that event the court will remand the case back for a further trial *on that one issue.* This is the general rule and it is applicable in the federal court both in law and in equity.

See:

4 *Corpus Juris*, p. 1193:

“The granting of a new trial on reversal is largely, although not entirely, a matter of discretion with the appellate court. * * * In the exercise of a sound judicial discretion an appellate court will on reversal order a new trial whenever it appears that the ends of justice will best be served by such a course.”

In the case of *Weygand Ferry Co. v. Ohio Railroad Co.*, 12 Supreme Ct. Rep. 188, 195, the complainant's complaint and proof was defective. The court, besides holding that it was within the discretion of the appellate court to permit an amendment furthermore said:

“But for reasons above stated, and under the peculiar and exceptional circumstances of this case, we think the decree of the court below should be reversed, but without costs, and the case remanded for such further proceedings as may be consonant with justice and in conformity to this opinion.”

See also, the case of *Dillingham v. Allen*, 205 Federal 146, where it is said, p. 147:

“However, if it is clear that the timber was converted, and *there is evidence in the record tending to show that the plaintiff was damaged as found by the master, though not technically proving market value.* In this contingency equity would require that the parties be afforded an opportunity of supplying the omission, and to that end the decree is reversed and the case is remanded to the District Court, with instructions to recommit to the master the matter of damages, permitting all parties to introduce proof to show the market value of the timber at the time it was taken, and thereafter take such other proceedings as may be necessary to do full equity between the parties.” (Italics ours.)

See, 4 *Corpus Juris.*, p. 1199, Section 3239, where it is said:

“It (an appellate court), will not generally undertake to render or order final judgment, on reversal, where the facts in issue are not fully developed or definitely settled, but will in such case order a new trial. The rule is applicable where the evidence is obscure, indefinite, uncer-

tain, or otherwise unsatisfactory; and it is especially applicable where, by reason of erroneous rulings of the lower court, either party has been prevented from fully developing the merits of his case."

See also, *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. Rep. 485, see p. 490. There the court said:

"It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. *At the same time, if for any reasons justice seems to require it, the court may simply reverse, and direct a new trial.* Indeed, this has been done, under special circumstances, in cases where there were no findings of facts or agreed statement, or where that which was presented was *obviously defective*. *Graham v. Bayne*, 18 How. 60; *Flanders v. Tweed*, 9 Wall. 425." (Italics ours.)

See also:

Exchange National Bank v. New York City Bank, 5 Sup. Ct. Rep. 141.

The cases cited by counsel do not militate against this rule. In fact they have no application to the case at bar. For instance, the case of *Price v. Kelly*, 154 U. S. 669, quoted by him was not a reversal but was an affirmation of a judgment. The decree in that case was in favor of the defendants. The upper court held that there was absolutely no evidence of infringement and therefore the decree should be affirmed. The same situation applies to the case of *National Casket Co. v. Stoltz*, 135 Fed. 535. There the court held that there was no evidence of infringement and

to remand the case to permit the amendment of the pleadings, the bringing in of another party and further proof to hold such other party. The same thing may be said of *Panzel v. Battle Island Paper Co.*, 138 Fed. 49. The remarks from the opinion in that case quoted by counsel applied to that part of the decree which was affirmed. The court refused to allow the appellant the right after the decree was affirmed to go back in the lower court and try again.

There is no analogy between these cases and the one at bar. Of course an upper court in confirming a judgment will not, except where unusual circumstances demand it, send the case back at the instance of the *appellant* so that the appellant can have another chance in the lower court. Of course, such a course would lead to an endless protraction of all litigation but the rule is different in the case of a reversal of a judgment. There the policy of the court is much more liberal. Then, as the authorities cited show if the reasons seem to justify it or if the fact in issue is not fully developed or definitely settled at the former trial for any reason or if the proof on the fact in issue was obviously defective the court in the exercise of its discretion will not only reverse the case but will send it back for trial on this particular issue.

In the last analysis the question of whether or not a final judgment should be entered on appeal by the upper court is one for the discretion of that court governed by the particular circumstances of the case under its consideration. It is clear that in the event

that it should be decided that the manufacture and sale by the defendants was in issue in this case, was not conceded at the trial and was not shown by the evidence a proper exercise of discretion by this court would require it, not to dismiss the case, *but to send the case back to the lower court for determination of this one issue.* If this issue had been raised by the pleadings or by the statement of counsel in court we could have proved it beyond the peradventure of a doubt. Every one of the 50 evaporators that were sold in the year 1923 were exact replicas of the patented device. The defendants knew this and therefore raised no issue about it. Their pleadings and whole attitude in court tended to lead us and the judge to believe that there was no issue made of this point. It is obvious therefore that the proof of this question was not fully developed because of the attitude of the defendants themselves. It is clear that under these circumstances it would be a harsh and unjust result to dismiss this bill when it is apparent that further and more adequate evidence may be produced. It is quite apparent from the record that there is available proof on this point. It is quite obvious that neither the court nor the plaintiffs went thoroughly into this issue. It is clear that further proof could be adduced as to the character of these devices sold by Neal and Ward in 1923 upon which they paid a royalty under a license describing this very patented device by its patent number. It is plain that such proof could easily have been supplied if it had been necessary and if defendants' counsel had stated that manufacture and sale was an issue in the case. Would it be justice then, when the acts of defendants' counsel lead

to the claimed defect in process, to dismiss the case? Would it be consonant with the policy of any appellate court which is to dispose of cases on their merits? The reply is clearly no. On the contrary the proper course to follow, if this court considers a reversal necessary on the ground that the manufacture and sale is not admitted by the pleadings, was not conceded at the trial and was not shown by the evidence, is to send the cause back to the lower court for trial on that one particular issue. We venture to say that in such an event the case would never go to trial. The defendants in 1923 never made any attempt to disguise the fact that they were manufacturing and selling this patented device. They did it openly, admitted it and claimed it was no infringement of any of the corporation's rights because the corporation's license had been cancelled and they would never stand trial on that issue.

Where the error in the trial relates only to a certain issue which is in no way dependent for its proper trial on certain other issues already satisfactorily tried, the appellate court in the exercise of a sound discretion will remand the case to the lower court for trial solely on that issue and will restrict the trial to that issue. This is the general rule on the subject.

See, 4 *Corpus Juris*, p. 1194, where it is said:

“It is a general rule, either under statutory authority or in the exercise of a sound judicial discretion, that, where the error in the trial relates only to a certain issue which is in no way dependent for its proper trial on certain other issues already satisfactorily tried and a partial new trial will not work injustice to any of the parties concerned, the cause may be remanded,

on reversal, for the trial of the issue erroneously tried, and for that alone."

See also:

Robinson v. Hayes, 186 Fed. 295;

Farrar v. Wheeler, 145 Fed. 483.

Accordingly should this court deem it necessary to require further proof on the manufacture and sale of these patented devices it should send the case back to be tried on this issue alone. We make this suggestion without intending to imply in the slightest way that there is any reason for reversal in this case. We believe that the discussion in this and in our other brief have established beyond the peradventure of a doubt that the manufacture and sale of the patented device was admitted by the pleadings, was conceded at the trial and was shown by the evidence and that the record clearly establishes that the defendants, until after their defeat in the lower court, never intended to claim that they were not manufacturing and selling this patented device, but on the contrary agreed to do so, did so and assumed the right to do so on the theory that the corporation, for which this action was brought, had lost its license.

We respectfully submit that the judgment of the lower court be affirmed.

Dated, San Francisco,

June 13, 1927.

Respectfully submitted,

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Attorneys for Plaintiffs-Appellees.



No. 5051

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),
Defendants-Appellants,

vs.

NORMAN LOMBARD, MONTGOMERY FLYNN, WIL-
LIAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lom-
bard, Elizabeth Lombard and Norman
Lombard, Junior,
Plaintiffs-Appellees.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),

Defendants-Appellants,

vs.

NORMAN LOMBARD, MONTGOMERY FLYNN, WIL-
LIAM T. ECKHOFF, NORMAN LOMBARD and
ELLEN LOMBARD, Trustees for Ellen Lom-
bard, Elizabeth Lombard and Norman
Lombard, Junior,

Plaintiffs-Appellees.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Permission thereunto having been obtained after argument, defendants-appellants submit the following points, arguments and authorities in reply to the first and supplemental briefs filed on behalf of the plaintiffs-appellees. As many of the assertions and contentions in plaintiffs-appellees' two briefs have been disposed of in our opening brief, we will not unnecessarily burden the court with a prolix discussion of those matters.

For convenience, we will hereinafter refer to the appellees as the plaintiffs and the appellants as the defendants.

I. NATURE OF THE CASE.

It will be unnecessary to restate the facts and circumstances out of which this litigation arose as this was done at length in our opening brief. It is sufficient to say that an analysis of the bill of complaint will reveal that this suit was brought essentially and primarily to enjoin infringement of one issued United States Patent and *two pending applications for patents not yet issued*. The defendants in their answer specifically deny the allegations of infringement in the bill, and it was upon this issue that the jurisdiction of the United States District Court was invoked. This is further attested to by the wording of the interlocutory decree from which this appeal is taken, in that it clearly and definitely states that defendants

“have infringed upon the said letters patent and upon the exclusive rights and privileges of the Progressive Evaporator Company, Inc. * * * That such infringement continued after full and due notice of the Progressive Evaporator Company, Inc.’s, rights as charged in said bill of complaint.”

(R. 92.)

It was further stated in said decree that the defendants are enjoined and restrained from:

“infringing upon and contributing to the infringement of said patent directly or indirectly and that a writ of injunction issue out.” etc.

and also:

“That the Progressive Evaporator Company, Inc., have and recover from the said defendants, * * * the profits which the last mentioned five defendants have realized and/or the damage which the Progressive Evaporator Company, Inc., has sustained from and by reason of the infringement aforesaid.” etc.

(R. 93.)

This should be sufficient to indicate conclusively the nature of this action notwithstanding the various statements of plaintiffs' counsel to the effect that this was an action brought by stockholders to set aside a certain transaction and to correct the alleged wrong done to the Progressive Evaporator Company, Inc., and *only incidentally* a suit for infringement of a patent. Notwithstanding several assertions of this nature, plaintiffs, in order to avail themselves of the jurisdiction of the federal courts, have advanced numerous arguments and contentions that are fundamentally grounded on the proposition that this is a suit brought for infringement of one issued patent and *two pending applications for patents not yet issued*. It is difficult to understand their inconsistency in this respect, for they have repeatedly attempted to stand first on one foot and then on the other. Let us examine a few of these statements and admissions to which we have alluded.

The opening statement in plaintiffs' first brief is sufficiently startling to immediately excite the interest of this court as to the jurisdictional grounds involved. The entire statement was italicized and reads as follows:

"This is an action in equity by one of the stockholders of a corporation (the Progressive Evaporator Co., Inc.) to set aside a transaction by which two of the directors of this corporation, one of whom was the secretary and treasurer thereof, entered into an agreement with the president of the corporation when the three of them constituted a majority of the directors of the corporation to take away the corporation's main asset (an exclusive license to make and sell a patented device) and give it to the president."

It will be noted that not one word is said about the infringement of patent rights being involved and it may be reasonably concluded that for the moment all thought of jurisdiction had escaped counsel's mind.

Again, on pages 32 and 33 of said brief, we note the following statements:

"In making this claim counsel shows that he has misapprehended the true nature of this action. He considers it an ordinary action for the infringement of a patent right. On the contrary, it is an action by the licensee through its stockholders against the licensors and inventors to restrain them from violating their agreement giving the licensee an exclusive right to the use of these inventions."

Also on pages 35 and 36 plaintiffs' counsel stated that:

"In their contention that the court erred in providing in the decree for a reasonable attorney's fee to be paid the plaintiff, counsel for defendants again indicate that they have overlooked the essential nature of this action. They have considered it as mainly an action for the infringement of patent rights, whereas it is mainly a stockholder's bill to right a wrong done a corporation and *only incidentally involves the infringe-*

ment of certain patent rights in which that corporation has an interest.'

Once again on page 37 of the brief, appears the declaration that:

“Counsel says that the plaintiff is limited solely to the recovery of the solicitor’s docket fee. He would be correct if this was an ordinary action for the infringement of a patent. But as this is an action in equity by a stockholder in favor of a corporation the rule that is set forth in the above cited cases applies and the lower court was justified in the exercise of its powers as a court of equity in making provision in the decree for the payment of the expenses of the plaintiff in this action, including a reasonable attorney’s fee.”

If these declarations were to be taken at face value and were solely decisive of the matter, they would undeniably tend to oust the federal court from jurisdiction. It is easy to see counsel’s position at this stage of the proceedings. Admittedly not a member of the patent bar and in a strange and unknown field of practice, he became alarmed at the defendants’ disclosure in their opening brief, that the record did not reveal an iota of evidence of the *construction or operation of the device* complained of to show infringement and that therefore the plaintiffs had wholly failed to sustain the burden of proof upon them to establish such infringement. Apprehensive of this unforeseen development in the case, he then conceived the strategy of calling this action something other than an infringement suit, but in so doing he temporarily forgot the matter of jurisdiction. It does not require great perspicuity to discern this fact from

the two briefs filed with their many vacillating arguments. Recognizing the insecurity of their position in this regard, plaintiffs herein, once more forsaking their determined stand that this was *not an infringement suit*, attempted to point out from the record and to argue that through concessions and admissions on the part of the defendants, infringement, the very gravamen of the complaint, was sufficiently established. That there is any such proof or inference the defendants vigorously deny and will later point out herein the complete absence of such matters in the record. In their supplemental brief, plaintiffs recognize their fatal error and attempt to remedy the same by reconciling these alleged admissions and statements with certain fallacious arguments and cases not in point. But what would seem to be decisive of the view with which counsel regards this case, was his own direct and unequivocal statement to the trial judge that this was a suit for infringement. We quote from page 117 of the record:

“Mr. ERSKINE. I was under the impression that your Honor had read the pleadings, and that perhaps that would obviate the necessity of making any statement.

The COURT. I have scanned over them, but perhaps I got lost in the great maze of them. Proceed with your statement.

Mr. ERSKINE. The situation is this: This is a stockholders' bill, commenced by Norman Lombard, and other plaintiffs, against the defendants, to enforce certain rights of the Progressive Evaporator Company against the other defendants, because of the failure of the directors to enforce those rights. The bill alleges—

The COURT. In other words, a stockholders' suit.

Mr. ERSKINE. Yes, for the infringement of a patent. It is claimed by the stockholders that the corporation might have sued for the infringement of this patent, and as it has not sued the stockholder is suing. The corporation was the licensee of these patent rights. The infringers are the patentees, themselves. That is the reason the action is brought in the federal court, under the ruling in the case of *Littleton v. Perry*, 21 Wallace, 223."

Plaintiffs seem to take the final position that because this suit

"incidentally involves infringement of certain patent rights"

is sufficient to give the federal court jurisdiction. But such is positively not the law.



II. FEDERAL JURISDICTION IS NOT FOUND IN THE MERE FACT THAT THE CONTRACT RELATES TO PATENTS.

The court in the case of *Wade v. Lawder*, 165 U. S. 624, 627, declared the law to be that:

"where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws." (Citing various authorities.)

The court in considering this matter in the case of *Victor Talking Machine Company et al. v. The Fair*, 123 Fed. 424, substantially declared the test to be that if the plaintiff is seeking a judgment for debt or damages, or a decree for cancellation or specific perform-

ance, on account of defendant's breach of his covenants, the cause of action arises out of the contract; and, though determination of the issue of breach or no breach may involve interpretation of the patent and of the prior art, the insistence that the device, according to the true construction of the patent and of the prior art, is not within the patent right granted in the contract, cannot change the nature of the action. On the other hand, if the plaintiff is seeking a judgment for damages, or a decree for an injunction and an accounting, on account of defendant's unauthorized use of the patent right in making or using or selling the device without license, the cause of action arises out of the patent laws although the determination of the issue of infringement or no infringement may incidentally involve interpretation of the contract.

The court in *By-Products Recovery Co. v. Maybee*, 288 Fed. 401, 404, expressed the rule as follows:

"It is established that, while federal courts have exclusive jurisdiction of all actions arising under the patent laws, such jurisdiction does not extend to every case in which a patent may be the subject-matter of controversy; that state courts may try questions of title and construe and enforce contracts relating to patents; that a suit to compel an assignment of a patent pursuant to a contract is within the jurisdiction of the state courts; and that, where an injunction against the sale of articles manufactured under a patent is only incidental to a decree for specific performance of a contract to convey the patent, it is within the jurisdiction of the state court, if it does not determine questions of infringement. *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. Ed. 513. Therefore it appears that the state court had jurisdic-

tion of the matters brought before it by the petition, and upon them its judgment is conclusive.”

Incidentally, this case also is authority for the proposition, to which we later refer, that an inventor has no right in pending applications for patents which would enable him to bring a suit for infringement. In this connection it was said by the court in the above case:

“As there is no common-law right of monopoly in an invention, that which was transferred to plaintiff, according to the bill, was the inchoate right to procure letters patent (*Gayler v. Wilder*, 10 How. at page 492, 13 L. Ed. 504), of which an assignment conveys the legal title to the patent when issued (*Wende v. Horine* [C. C.] 191 Fed. 620; *Hildreth v. Auerbach* [D. C.] 200 Fed. 972; *Individual Drinking Cup Co. v. Osmun-Cook Co.* [D. C.] 220 Fed. 335). But prior to the date of his patent the inventor had no exclusive right to make, use, or sell his invention. *Brill v. St. Louis Car Co.* (C. C.) 80 Fed. 909, 910. Therefore the action in the state court was not one for infringement of a patent, but to enforce a contract establishing title to an invention, drawing with it right to obtain a patent and to enjoin violation of that contract.”

(p. 404.)

The syllabus of the case mentioned in the above opinion, that of *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 474, reads as follows:

“The Federal courts have exclusive jurisdiction of all cases under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy.

Courts of a state may try questions of title and construe and enforce contracts relating to patents. *Wade v. Lawder*, 165 U. S. 624.

A suit, to compel assignment of a patent and to enjoin manufacturing and sale of articles covered thereby, because the patent is an improvement on an earlier one and included in a covenant to convey all such improvements, is based on general principles of equity, and is within the jurisdiction of the state court.

Where the injunction granted against sale of articles manufactured under a patent is only an incident to a decree for specific performance of a contract to convey the patent as an improvement of an earlier one, the relief is appropriate, and, if it does not determine questions of infringement, is within the jurisdiction of the state courts."

Also see *Lowry et al. v. Hert*, 290 Fed. 876, 878, 879, wherein the court, after reviewing certain cases, remarked:

"They establish that where the suit is clearly and plainly one brought for infringement of patent, and involving the issues usual in such cases, the fact is not fatal, whether it appears by the bill or by the answer, that the defendant has had a license under the patent, and that the matter of actual dispute between the parties is whether that license, according to its terms, is still in force. In these cases it has been considered that the main and primary question is one of infringement, and that the question whether there is a license continuing in force must be taken as a secondary and collateral dispute, however controlling it may turn out to be. If the defense of license is sustained, the plaintiff's jurisdictional case remains unimpeached, but a good defense has been shown. A license is an exception cut out of the broader right, the considerations which make such a defense incidental or collateral do not apply with the same force, if at all, where the title itself is involved.

However this might be, we think it might be conceded for the purpose of this opinion that an infringement suit in ordinary form, seeking a decree that the patent was valid and that it had been infringed, and praying injunction and accounting for profits and damages arising from infringement, would present a case arising under the patent law, even though it alleged that defendant was claiming title to the patent under a void conveyance and asked to have that conveyance set aside or disregarded as of no force."

In this last considered case, the court was of the opinion that the nature of the action was to be determined from the allegations in the complaint, but was unable to find in the bill the necessary averments of infringement, and therefore reached the conclusion that the court below never acquired jurisdiction of the case, and remanded it to that court with instructions to remand to the state court.

Thus, if in the present case, this court were to find, as plaintiffs contend in their briefs, that this is not a suit brought for infringement of certain patent rights, then the court's one remaining duty would be to send this case to the state courts for trial.

The whole proposition resolves itself into a determination of what is the gravamen of the complaint—whether infringement or contract right. If it is the former, then undoubtedly the plaintiff must sustain the burden of proof resting upon him in actions of that kind to show infringement, and could then of course invoke the jurisdiction of the federal courts. But if the gravamen of the complaint is based on contract rights *and only incidentally involves patent*

rights then the federal courts have no jurisdiction and the case should be sent to the state courts.

Also see *Atherton Match Co. v. Atwood-Morrison Co.*, 102 Fed. 949, wherein the historical development of this rule of law is thoroughly reviewed.

It thus clearly appears that once having raised certain issues in the complaint, the burden rests upon plaintiffs to sustain the material allegations of their bill and this proof must be in accord with their pleadings.

The case of *American Brake Shoe and Foundry Co. v. Pittsburgh Rys. Co.*, 296 Fed. 204, 213, is authority for

“the doctrine that *allegata and probata* must be in accord applies to equity, as well as common-law trials, and the averments of the bill as averred must of course be found to be in accord with the facts as disclosed by the evidence.”

III. THERE CAN BE NO INFRINGEMENT OF A PENDING APPLICATION FOR A PATENT AND THE DECREE IN GRANTING AN INJUNCTION AGAINST SUCH INFRINGEMENT SHOULD BE REVERSED.

Plaintiffs in their supplemental brief have devoted much discussion to the proposition, as expressed on page 9, that

“As the Federal court of Equity had jurisdiction of the action because it involved the infringement of a patent it had jurisdiction to grant complete relief to the plaintiffs including the restraint of the violation of the license agreement in all respects.”

They further state that it cannot be claimed:

“In view of the decisions that the fact that the plaintiffs in addition to seeking relief from the infringement of the patent also ask relief against the violation of the license agreement in other respects ousts this court of its jurisdiction. The decisions hold that the court is not deprived of its jurisdiction by reason of the existence of other questions beside the question of the infringement of the patent.”

We are much surprised that a point should be made of such an elementary rule of federal jurisprudence. We have never contended that the court is ousted of jurisdiction as to the entire suit, but we do insist that the court has no power to enjoin violation of the monopoly which does not exist, i. e. as to the *pending applications*. The proposition that the award of an injunction and an accounting for an alleged infringement of mere *pending applications* is entirely contrary to law, seems too obvious to warrant discussion. Under subject IV of our opening brief, we thoroughly discussed this point and the cases in support thereof and we note that plaintiffs have not cited a single authority, even remotely to the contrary. In their first brief pages 32 to 35, plaintiffs contend that before the granting of a patent, an inventor has a qualified property in his invention and may give an exclusive license for the use of such an invention, even before it is patented. We have never denied this and it is entirely beside the point. The cases cited by plaintiffs, without exception, do not go so far as to say that an inventor has such right in his invention, and before the patent is granted, as would enable him to bring suit for infringement of a *pending applica-*

tion. That is the very essence of the present question under consideration. Independently of all other questions, no courts, either state or federal, have ever accorded such relief as is herein sought, as to pending applications, and this would be especially true on a record such as this where there is absolutely *no evidence as to the construction or mode of operation of the invention covered by the pending applications.*

Plaintiffs have cited the case of *Excelsior Wooden Pipe Company v. Pacific Bridge Co.*, 22 Sup. Ct. Rep. 681, on page 9 of their supplemental brief, but, have failed to point out that no pending applications were involved in that suit. It is undeniably true that questions of *title* as to the monopoly alleged to be infringed necessarily are included within the court's purview. But it cannot be contended from this that the court has any jurisdiction over the purely contractual matters not relating to the title to patent in suit. Indeed the very reverse is true and the *Excelsior* case may be taken as authority for this proposition. It will also be noted that in this connection the case of *Littlefield v. Perry*, 21 Wall. 221, is cited. An examination of this case reveals the fact that it was unquestionably a suit for infringement, and the court in saying that

“such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved, it carries with it the whole case.”

goes no further than the well recognized rule, nor does it mean to say any more than that the title to the monopoly, and infringement thereof, may always be considered together.

Plaintiffs state on page 13 of their supplemental brief:

“Thus it will be seen that the fact that the bill of complaint asked for an injunction restraining the violation of the license agreement in other respects, besides the infringement of the patent did not oust the court of jurisdiction and the court made no error in restraining all other violations, by the defendants or the license agreement, as well as the infringement of the patent.”

It is significant that they cite no authorities in support of this obvious fallacy and we challenge them to present a single case wherein the court has undertaken to consider and determine anything more than the question of infringement and the title to the monopoly.

Further along on the same page, plaintiffs say:

“As the federal court had jurisdiction to prevent the infringement of the patent by the defendants it could also enjoin the violation of the license agreement in all other respects by the defendants.”

This is to say, in effect, that the trial court could award relief for infringement of two *pending applications*, which is obviously relief no court can grant.

In the last paragraph on page 15 of said supplemental brief, the statement is made that:

“It was shown at the trial that not only had defendants entered into a license agreement with Neal and Ward which required them to violate the license agreement given the corporation but also the Rees Blow Pipe Mfg. Co., under their control entered into a manufacturing agreement with Neal and Ward which required it to violate the license agreement.”

It is to be noted that the manufacturing agreement between the Rees Blow Pipe Mfg. Co. and Neal and Ward was not introduced in evidence, and that neither said agreement nor the one between Rees and Hine on the one part and Neal and Ward on the other, included any description of the construction and operation of the evaporators to be manufactured, and made no attempt to show their detailed construction and mode of operation which was necessary before the twelve claims could be said to have been infringed. We know of no case which has ever attempted to enjoin the violation of a license per se, and yet this is, in effect, what the plaintiffs herein are seeking. Their statement at the bottom of page 16 of the supplemental brief that if the defendants were not infringing these inventions they are not then harmed by the injunction of the court, which merely restrained them from such infringement, is both inaccurate and misleading, as the decree also ordered an accounting. (R. 95.)

Plaintiffs then continue by making the assertion that as pointed out in their first brief, pages 8 to 10 and 32 to 35 thereof, the corporation was entitled to protection against the violation of its license by the defendants who were its licensors, and, at the same time its officers and directors, irrespective of whether or *no there was an infringement of patent involved.* This, as may be seen from the context, constitutes an entirely different stand, and we note the significant fact that no authorities are cited in support of such a contention. Plaintiffs then state that:

“the fact that there were other respects in which the license agreement was violated besides the infringement of the patent did not oust the court of jurisdiction.”

(p. 17, Supplemental Brief.)

It is interesting to note that none of the cases cited by plaintiffs are authority for such a contention and that not a one of them went any further than to hold that the presence of the question of title to the monopoly did not oust the jurisdiction.

IV. DEFENDANTS' ANSWER SPECIFICALLY AND POSITIVELY DENIED INFRINGEMENT.

The plaintiffs have devoted a considerable part of both briefs to a discussion of what they term “admissions” in the defendants’ answer. The stand was first taken that said answer admits the manufacture and sale of patented devices and that therefore infringement follows as a conclusion (see pages 11 to 15 of plaintiffs’ first brief), and then in the supplemental brief they attempt to enlarge upon this point. (Pages 24 and 25.) Plaintiffs have furthermore quoted passages from defendants’ answer but have studiously avoided a quotation in full of all relevant denials of infringement. An inspection of the denials in said answer cannot fail to convince even the most prejudiced reader that infringement has been specifically and positively denied. In support of this contention, we have below set out for the court’s convenience, the various allegations of infringement in the bill of complaint and the denials of such infringement in defendants’ answer.

“That thereafter the said Neal, Rees and Hine, entirely neglected the business of the said Progressive Evaporator Company, Inc., and disregarded and ignored its rights in all particulars, and in violation and infringement of the patent rights and of the letters patent covered by the said license agreement, in which the said corporation has an interest by virtue of said license agreement, the said Rees and Hine, and the Rees Blow Pipe Manufacturing Company, Inc., and the said defendants Neal and Ward individually, and as copartners have manufactured and sold and are now manufacturing and selling the said patented devices, and that said defendants last above mentioned ever since the 13th day of January, 1923, in pursuance of said fraudulent conspiracy and scheme have infringed and violated the said rights secured by said patents above referred to, and the interests of the Progressive Evaporator Company, Inc., to said patent rights created by said license agreement.”

“These defendants deny that thereafter, said Neal, Rees and Hine, or any of them, neglected entirely, or otherwise, or at all neglected the business of said Progressive Evaporator Company, Inc., and/or disregarded and/or ignored its rights in all or any particulars and/or in violation and/or infringement of the patent rights and/or of the letters patent covered by said license agreement said Rees and Hine and/or Rees Blowpipe Manufacturing [67] Company, Inc., and/or said defendants, Neal and Ward, individually and/or as copartners have manufactured and/or sold and/or are now manufacturing or selling said patented devices and/or that said defendants Rees, Hine and Neal, or any of them, ever since January 13th, 1923, in pursuance of said fraudulent conspiracy and/or scheme and/or at any other time *or at all*, have infringed and/or violated said rights secured by said patents above referred to, and/or the interests of said Progressive Evaporator Company, Inc., to said patent rights

Plaintiffs' Bill of Complaint
(continued).

“That the defendants Dee Hi Food Products Company, A. C. St. Marie with full knowledge of the facts set forth hereinbefore and well knowing the rights of the Progressive Evaporator Company, Inc., as set forth herein, to exclusively manufacture and sell the said drying systems and equipment, have assisted, and are now assisting and aiding and abetting the defendants, Rees, Hine, Neal, Ward and the Rees Blow Pipe Manufacturing Company, Inc., in the manufacture and sale of said devices, drying systems and equipment, and in the infringement of said patent and patent rights.”

(R. 24 and 25.)

Defendants' Answer
(continued).

created by said license agreement.”

“These defendants deny that the defendants, Dee Hi Food Products Company and A. C. St. Marie, or either of them, as alleged in Paragraph XVIII of said complaint, or otherwise, or at all, have assisted, and/or are now assisting, and/or aiding and/or abetting defendants Rees, Hine, Neal, Ward and Rees Blowpipe Manufacturing Company, Inc., or any of them, in the manufacture and/or sale of said devices, and/or drying systems, [69] and/or equipment, in the infringement of said patent and/or patent rights, or any thereof.”

(R. 81.)

“These defendants deny that the defendants, or any of them, threaten and/or declare that they, or any of them, will continue to infringe upon said patent and/or patent rights or any thereof. In this behalf these defendants allege that *none of said defendants are now or ever have infringed upon any*

rights of plaintiff in or to the devices, drying systems and equipment or any thereof, referred to in the bill of complaint."

(R. 81, 82.)

It will thus be seen that the issue of infringement has been unquestionably raised by the pleadings. The defendants have denied infringement in positive and certain terms, and have a right to expect the Appellate Court to consider this as an appeal from an interlocutory decree enjoining infringement of one issued United States patent and *two pending applications for patents not yet issued*.

Throughout plaintiffs' discussion of this feature of the case, they have persistently extracted from defendants' answer only certain passages which seem to them to be open to attack, and they have deliberately and consistently closed their eyes to the positive denials of infringement in said answer. But conceding solely for the purpose of argument, that the answer did not contain these unequivocal and complete denials of infringement which the plaintiffs have so studiously overlooked and which we have above set forth, but embraced only those parts which plaintiffs have elected to criticize, we still earnestly contend that even in that case the answer is so drawn as to positively deny infringement.

In this connection, we quote from 21 *Corpus Juris* 483:

“While an answer is subject to exceptions if it denies evasively instead of directly, or generally instead of specifically, or literally instead of substantially, such denials are not taken to admit the facts attempted to be controverted. A general denial or a negative averment in an answer, although insufficient on exceptions, cannot be deemed an admission of the averments of the bill thus denied, after replication, and no relief can be granted upon those averments in the absence of proof.”

While it is true that the Equity Rules have abolished exceptions to answers, they have also provided other remedies to be taken advantage of by a plaintiff who is confronted by an evasive, ambiguous or incomplete answer. Had plaintiffs in the present action so considered defendants' answer, under the present Equity Rules they could have moved to strike out, and upon the court's ruling that the answer disclosed no defense and contained no direct denial of the allegations in the bill, they could have taken a decree *pro confesso*.

Thus, in the case of *Western Union Telegraph Company v. Louisville & N. R. Co.*, 261 Fed. 654, a motion was made to strike out part of the defendant's answer on the ground that said answer did not raise issues on which the defendant was entitled to a hearing.

In the case of *Johns-Pratt Co. v. Sachs Co. et al.*, 176 Fed. 738, 739, 740, the plaintiff moved to strike out a part of the defendant's answer. In this connection, the court remarked:

“The paragraph of the answer above set forth is the cause of this contention. It has been excepted to as impertinent, and a motion to strike

it out has also been entered, charging that it is impertinent, immaterial, and irrelevant. The question of law which stares us in the face is this: Does an allegation that the complainant is a party to an unlawful conspiracy, which tends to restrain trade and oppress the defendant in its business, afford any defense to a suit for the infringement of letters patent, the title to which is vested in the complainant?

This question has been answered in the negative by the courts with such unanimity and decisiveness that it would be wasted energy for me to do more than cite *National Folding Box & Paper Co. v. Robertson* (C. C.) 99 Fed. 985.

* * * * *

To leave the paragraph in, because it sets up an alleged substantive defense, which has been, time and again, decided by the courts to be a futile defense, would be, to my mind, an idle thing and a travesty. If it shall so happen that upon final hearing the issues shall be decided against the defendants, it seems to me to be obvious that the action of the court with regard to the objectionable paragraph, if wrong, could be remedied on appeal.

The motion to strike out is granted.”

Thus, it may be seen that had the plaintiffs considered the defendants’ answer to be unresponsive, equivocal, ambiguous or to have contained immaterial and irrelevant matters, they could have availed themselves of their remedy by motion to strike out. It is now too late, therefore, for plaintiffs to contend here that the defendants’ pleadings were insufficient and failed to raise the issue of infringement.

On pages 11 to 15 of their first brief, plaintiffs have cited certain authorities in support of their contention that the defendants’ answer does not “specifically

deny infringement". Of course, throughout this argument, they have applied their authorities to only those parts of the answer which they elected to take advantage of, and have utterly disregarded the positive denials of infringement which this answer certainly contains. The plaintiffs state that they rely principally on two certain cases, that of *Ely v. Monson* and *B. Mfg. Co.*, 8 Fed. Cas. 605, Case No. 4431; and,

Jordan v. Wallace, 13 Fed. Cas. 1104, Case No. 7523.

To show the inapplication of the former case, we quote from the opinion on page 605:

"And when plaintiff alleges that defendant used a certain machine, *which he describes*, and defendant *does not disprove or deny* it is an admission that he uses such a machine."

The above case apparently was not tried in open court, but following one of the old customs was submitted for determination on affidavits filed in conjunction with the pleadings. The opinion indicates that the plaintiff had completely described the construction and operation of the device in question and the defendant had failed to *deny or disprove* the plaintiff's case. Thus, it is perfectly obvious that the two situations are not comparable and the case cannot be said to be in point in a single material respect.

Plaintiffs' counsel has also cited and quoted from the case of *Gordon v. Wallace*, supra. This case is not in point for the following reasons:

In actions for infringement, the usual and customary allegations in the bill are that defendant made,

used and sold devices embodying and containing the invention disclosed and claimed in and by certain letters patent, and thereby has infringed upon said letters patent, and upon each and all of the claims thereof. Thus, it will be seen that the averment of infringement is a mere legal conclusion. The defendant, in order to put the question of infringement into issue, will follow in his denial the language of the complaint and usually will deny the making or using or selling of devices embodying or containing the alleged invention disclosed or claimed in or by said alleged letters patent, and will further deny that he has infringed upon said letters patent or upon any of the claims thereof. Counsel in the present case has not followed this usual form, but has alleged that the defendants "in violation and infringement of the patent rights and of the letters patent covered by said license agreement, in which the said corporation has an interest by virtue of said license agreement", had manufactured and sold the devices, and have, pursuant to said fraudulent conspiracy and scheme, infringed and violated the said rights secured by said patent referred to. In their answer the defendants follow the language of the complaint and deny the violation or infringement of the patent right and/or of the letters patent covered by said license agreement, and deny that they have "manufactured and/or sold and/or are now manufacturing or selling said patented devices and/or that said defendants * * * in pursuance of said fraudulent conspiracy and/or scheme and/or at any other time *or at all*, have infringed and/or violated said rights secured by said patent above referred to".

Thus, it is clearly seen that each and every averment contained in the bill has been specifically denied by defendants and, in fact, it is perfectly obvious that the pleader followed very closely and carefully the allegations of the complaint. It is never required of a defendant that he deny more than is alleged in the bill. As pointed out in our opening brief, the issue framed by the pleadings is the usual issue of non-infringement in a patent suit. The fact that both the bill and answer contain allegations and denials with respect to infringement of rights under the license agreement, is merely surplusage and concededly the jurisdiction of the court below and of this court depends upon the fact that the suit is one for alleged infringement of letters patent and not for breach of any contract.

In the case of *Jordan v. Wallace*, supra, cited by plaintiffs, it clearly appears that the bill contained an allegation of the use of the invention described in the patent which the defendants *did not deny*. They merely denied that it was used

“with a full knowledge of the premises mentioned in said bill of complaint and in violation of the complainant’s exclusive rights secured by the patent of 1864.”

It will thus be seen that in said case, the denials in the answer did not meet the language of the complaint, and no denial of the use of the device was even pretended. It created a situation where one of the main averments of the bill was, in effect, left unanswered, although referred to by a negative pregnant.

The case in this respect differs materially from the one at bar. Furthermore, in rendering its opinion in the above case, the court took into consideration that the answer contained *express admissions* that certain features of the device complained of were made and constructed in some respects substantially in imitation of the improvement claimed by the patentee. There is in the present case no feature at all analogous to that situation. In their supplemental brief, pages 24 to 25, plaintiffs do no more than to reassert their old argument that the answer does not unequivocally deny manufacture and sale of the patented device, and they then set out an incomplete and misleading part of defendants' answer. We entirely fail to comprehend counsel's argument that the answer should go further than the bill of complaint and deny an allegation not contained or mentioned therein.

Furthermore, it is said that the defendants' denial is "nothing but the denial of a conclusion of law". Counsel seems to be unaware of the fact that such is the only possible denial in a patent suit because infringement can only be alleged, as plaintiffs did in this case, in the form of a conclusion of law. Our last thought on this feature of the case, is that although a defendant would admit making, using or selling some device, the real issue would be whether or not such device embodied the patented invention, and therefore infringed. Thus, the burden rested upon plaintiffs to affirmatively prove the manufacture and sale of a device *embodying the combination of elements defined in one or more of the twelve claims of the patent in suit*. The patent in question covers

an invention of a very narrow and restricted scope residing principally in details of construction. Each of the twelve claims is a combination claim consisting of an enumeration of a long list of elements, each forming part of the claimed combination. As pointed out in our opening brief, it is elementary that to show infringement of such claims, it is essential to show in the machine complained of *the presence of each and every of the enumerated elements of the claim relied upon operating in the alleged infringing device according to the same mode of operation as that of the machine of the patent and accomplishing the same result*, in order to establish infringement of said claim. Thus, the question before the court is whether the plaintiffs have sustained that burden of proof, and, in this connection, it is practically conceded that there is *no proof in the record*. On page 31 of the supplemental brief, counsel has made the admission that

“It is obvious therefore that the proof of this question was not fully developed.”

and then he endeavors to excuse the omission by adding:

“Because of the attitude of the defendants themselves.”

He would, in effect, place on the defendants the burden of developing the plaintiffs' own case, an unheard of contention in legal practice. Never before have we heard it urged that the defendant can be held responsible for the plaintiff's lack of proof of the material allegations of his own complaint.

V. DEFENDANTS POSITIVELY DENIED INFRINGEMENT AND WERE UNDER NO DUTY TO POINT OUT TO PLAINTIFFS THEIR FAILURE TO SUSTAIN THE BURDEN OF PROVING INFRINGEMENT.

Plaintiffs attempt next to patch up their omission to prove infringement by advancing the argument that:

“The case was tried on the theory that the manufacture and sale by the defendants of the patented device was conceded.”

They devote to this contention pages 15 to 21 of their first brief, and pages 21 to 23 of their supplemental brief, although in the latter brief, they apparently forsake their argument of theory to contend that the

“Defendants conceded infringement at the trial of the action.”

The cases cited by plaintiffs are obviously not in point with the issues herein and need no discussion. After a thorough review of the authorities dealing with the theory upon which a case is tried, we have failed to find a single case which even remotely suggests that where there is a failure of proof to support the allegations of the complaint, the defendant is under the burden of introducing proof to disprove such allegations. That is the sole proposition before this court in this connection. The plaintiffs herein advance a certain theory in their complaint and the application of said theory was put in issue by the denials contained in defendants' answer. At the trial of the cause counsel utterly failed to develop his theory and neglected to offer proof to sustain the

material allegations of the complaint and now on appeal wishes to charge defendants with that dereliction.

Plaintiffs in both briefs refer to a remark of defendant's counsel as to the main issue involved. It is submitted that we have never heard of a situation where plaintiff's counsel, in failing to cover a certain point in his opening statement, can still expect defendant's counsel to point out to him his neglect and oversight in that regard, and, in effect, educate him in the trial of a lawsuit. And yet that identical situation is here presented. Defendants denied infringement in their answer and no duty or burden of proof or even reference to that denial is required of them until the plaintiffs offered proof in support of the burden of proving infringement, from which duty they cannot escape. It is inconceivable that there can be a question as to such a simple proposition as this and it certainly requires a remarkable inventive faculty to attempt to construe plaintiffs' failure of proof into the advancement of a theory, on the part of defendants, that such proof is unnecessary.

In other words, can plaintiffs' failure to offer proof of a material issue raised by the bill and answer, commit *defendants* to the theory that such proofs are unnecessary and deprive defendants of the right to urge such lack of proof on appeal? This is the very gist of plaintiffs' contention here. Yet no authority is cited by them and it is inconceivable that there could be any authority in support of such a proposition. Cases dealing with this point almost invariably are based on a state of facts where the plaintiff him-

self has raised certain issues by the pleadings, has then tried the case on those issues, and then, on appeal, has attempted to rely on other issues and contentions not revealed in said pleadings, or brought to light at the trial of the case. There is obviously a complete and full distinction between that line of cases, and the present one wherein there has been a complete failure of proof on the part of plaintiffs to sustain the material allegations of their bill.

VI. DEFENDANTS DID NOT COMMIT THEMSELVES TO A THEORY BECAUSE THEY MADE NO ATTEMPT TO DISPROVE AN ISSUE RAISED BY THE PLEADINGS WHEN PLAINTIFFS HAD ENTIRELY OMITTED TO OFFER ANY PROOF WHATEVER TO SUSTAIN SAID ISSUE.

It is elementary that defendants are not required to offer proof in refutation of an issue raised by the pleadings until plaintiffs have adduced some proof in support of said issue. Plaintiffs are always under the necessity of proving the material allegations of their bill, and it is inconceivable that their entire omission to produce a single shred of evidence in support of an essential issue could, in any possible manner, reflect on the defendants or commit them to a theory because they do not offer proof to disprove the unsupported issue. In other words, if the issue is not first of all established and proved, then the defendants are not required to take the initiative and attempt to refute something or other which has never been established, and, this is especially true where there was *not even an attempt to offer proof in support of the said issue.*

There is no other conclusion that could be reached in such a matter, and it is scarcely necessary to cite authorities in support of such an elementary proposition.

It is furthermore to be borne in mind that the cases dealing with departure on appeal from certain trial theories, concern themselves practically altogether with those situations wherein the *plaintiff* has neglected to raise a certain issue in the bill or has omitted to rely on and develop said issue at the trial. Thus, it is usually the plaintiff and not the defendant who develops the trial theories, unless, of course, the defendant has alleged an affirmative defense. Even in that case, the defendant would be limited to his own theories affirmatively pleaded and would not be responsible for the theories created and advanced by plaintiff.

Thus in the present case, it is impossible to construe defendants' silence on the issue of infringement which had been raised in the pleadings, to indicate a certain theory or attitude or even an inference of such. In this respect the two following cases are conclusive authority.

The case of *Brill v. St. Louis Car Co. et al.*, 80 Fed. 909, held that one's failure to produce evidence gives rise to no inference as to his lack of it. The mere fact that it was easy for defendants to disprove an intention to infringe does not make his omission to do so presumptive evidence that he entertained such intention.

It was likewise held in *Rosenthal v. Pine Hill Consol. Min. Co.*, 157 Fed. 83, that the defendant's failure to produce evidence gives rise to no inference as to his lack of it.

VII. THE RECORD IS DEVOID OF ANY ADMISSION OR INFERENCE THAT DEFENDANTS CONCEDED INFRINGEMENT.

The further contention of plaintiffs that defendants at the trial admitted or conceded infringement is also untenable. There is not in the entire record a single statement, which even if given the broadest and most liberal construction, could be said to amount to an admission. In this connection, it might be well to see what the courts have said in regard to admissions.

In the case of *Pulver v. Union Investment Co.*, 279 Fed. 699, it was held that an admission must be certain, consistent and definite, couched in language reasonably capable of the interpretation sought to be placed upon it, and conjectural and suppositious statements were excluded.

This point is illustrated very well in the opinion of the court in the case of *Wilhite v. Skelton et al.*, 149 Fed. 67, 71, wherein it was said by Judge Sanborn of the Eighth Circuit:

“Counsel for the appellee Skelton insist that at the argument of the demurrer in the trial court complainant's counsel admitted in open court that the agreement they pleaded was oral, and that the trial court decided the case in reliance upon that admission. But the transcript before us discloses no record, no certificate or

opinion of the court that any such admission was made, and there is no stipulation or admission of that fact by counsel for the complainant in any form in this court. It is true that the opinion of the Court of Appeals of the Indian Territory indicates that it was of the opinion that such an admission had been made in the trial court. But cases cannot be heard and decided in an appellate court upon the statement of counsel for one of the parties of admissions of their opponents at the hearing which are not disclosed by, and are contrary to, the transcript of the record presented to the appellate tribunal. *If they would avail themselves of such admissions in a court of review, they must by written stipulation of opposing counsel or by proper proceedings in the court of original jurisdiction spread them upon its record and present them to the appellate court in the transcript.*"

Thus, in the present case, as the record does not disclose admissions, or language which could even be said to remotely constitute such, it is clear that the plaintiffs' contention the case was tried on a certain theory, that is, that infringement was admitted, cannot be taken seriously and is only an additional step taken to cover up and becloud the real issue, i. e., plaintiffs' failure to sustain the burden of proof.

Plaintiffs herein, under any conceivable rule of law, could not have transferred to the defendants their essential burden of producing sufficient proof to establish infringement. In our opening brief, we have dealt fully with the measure of proof required in this regard and we will not further burden this court with additional discussion of authorities.

VIII. THE PLAINTIFFS HAVE WHOLLY FAILED TO SUSTAIN
THE BURDEN OF PROOF UPON THEM TO ESTABLISH
INFRINGEMENT.

Plaintiffs' next contention that:

“The manufacture and sale by defendants of the patented devices were conclusively established by the evidence” (pages 21 to 23 of Plaintiffs' first brief),

and that:

“Payment of royalties by Neal and Ward to Rees and Hine were for manufacture and sale of the patented device” (pages 21 to 24 of Plaintiffs' supplemental brief),

may be considered together and represent striking departures from their argument that such infringement was conceded by the defendants and no proof of it was needed. If, during the trial of this cause, the plaintiffs had actually relied upon the alleged theory that infringement was admitted, we are surprised that then they would have attempted to offer proofs on that score. The only logical conclusion to be drawn from such conduct, is that plaintiffs did not originally have the remotest idea that defendants admitted infringement, after specifically denying it in their answer, and understood that proof of it must be adduced at the trial. That they failed miserably in that attempt, cannot, in any sense, be imputed to the defendants herein, although that would seem to be plaintiffs' present object.

Plaintiffs argue that because the record indicates that the defendants gave Neal and Ward a license to make and sell *certain evaporators*, and, that the Rees Blow Pipe Manufacturing Company agreed to manu-

facture *certain evaporators* for Neal and Ward, this showing without any proof of the construction and mode of operation of the evaporators made under said license agreement would constitute proof of infringement. We cannot imagine a more illogical conclusion or one departing further from the rules of law in this respect. The mere showing that Neal and Ward had been granted a license similar to that under which the Progressive Evaporator Company, Inc., operated, does not create even the presumption that defendants must necessarily have built and sold machines having the construction covered by the claims of the patent and the *pending applications* not in evidence. Infringement is a tort, and as such cannot be proved by inference or presumption, but it must affirmatively be shown that the device complained of was in fact constructed in accordance with the claims of the patent. This is positively declared to be the law in the case of *Edison Electric Light Co. v. Kaelber*, 76 Fed. 804, 806, where in the court declared:

“There is an allegation of infringement on information and belief and a positive denial under oath. There is no proof of actual infringement. There is proof that a contract was awarded the company which if carried out pursuant to the specifications may involve infringement and may not.

* * * * *

Remembering that the burden of proving infringement is upon the complainant, and that even in a quia timet suit there must be ‘well-grounded proof of an apprehended intention to violate the patent right’, it is thought that there is a failure to prove a case against the defendant.”

Morrill v. Hardware Jobbers Purchasing Co. et al., C. C. A. (2nd Circuit), 142 Fed. 756, is a still stronger case in this regard. It was therein held that although the offer by the defendant of an application for a patent which showed a device infringing a prior patent, with a statement that defendant is manufacturing thereunder, is *insufficient to prove infringement of the prior patent*. The court said:

“We concur in the conclusion reached by the court below as to claim 1 of patent No. 441,962, for the reasons stated by the court in its opinion. The offer by defendant of a copy of an application for a patent, with a statement that the defendant is manufacturing thereunder, is insufficient alone to prove infringement. It merely serves to show that the defendant claims to manufacture its devices under the protection of said application, so far as it may be material.”

This last quoted case is directly in conflict with plaintiffs' contention that because defendants were shown to manufacture *certain evaporators* (construction of which is left to the imagination) under a license agreement, that therefore the said evaporators were constructed so as to infringe the claims of the patent. Such is the acme of absurdity.

For a further development of this principle, let us see what the court had to say in *Morton Trust Co. et al. v. Standard Steel Car Co.*, C. C. A., (3rd Circuit), 177 Fed. 931, 933:

“The last item of proof in the case is a blue print of the machine which the defendant is now using. It was voluntarily submitted to the complainants by the defendant, and was offered in evidence by the complainants as they closed their

rebuttal proofs. The counsel for the complainants contend that it shows continued infringement by the defendant. There is not a line of testimony explaining the exhibit. It is a complicated drawing, and it would be highly presumptuous in us to say it shows infringement. A combination claim is never infringed, except by the use of that which embodies every element of the combination or its equivalent. The burden of proof was on the complainants. Infringement cannot be found on the blue print alone. It follows that the complainants are not entitled to an accounting."

On pages 17 to 21 of their supplemental brief, plaintiffs again refer to the license agreement given by the defendants Neal and Ward, and that the testimony revealed that fifty devices, whatever their construction may have been, were sold. Plaintiffs further say that these devices were described in the license, but we believe this to be an erroneous statement. An examination of said agreement reveals no such description and furthermore there was not even an attempt made in said agreement to show the construction or operation of said devices.

It is next alleged that Neal and Ward paid to Rees and Hine royalties during the year 1923 for the manufacture and sale of *certain evaporators* and that the book in which the payment of these royalties was entered was exhibited to this court at the argument, and that "the payment of royalties is conclusive proof of the making and selling of the patented device". This is decidedly not so. Royalties were due if *any one of the three inventions*, with respect to which the license was granted, was embodied, and therefore the

presence of either of the two unpatented inventions, would have caused royalties to the full amount to be due.

Thus, the license expressly states that:

“WHEREAS, the Second Parties, under said firm name of Progressive Evaporator Company, have been and now are engaged in the business of manufacturing and selling devices embodying the said inventions, *or some of them.*”

(R. 37, 38.)

Furthermore, that the First Parties grant to the Third Party the exclusive right and privilege, etc.:

“of making and selling, for use in drying food substances, but for no other use, devices embodying said inventions, *or any of them,*”

(R. 38.)

and that:

“By way of royalty, the Third Party shall pay to the First Parties *on each and every of said devices,*” etc.

(R. 38.)

Thus, the mere payment of certain royalties without further proof of the mechanical construction of the devices, and the particular invention embodied therein would not justify the inference that the patented one of the three inventions was embodied in the devices on which the alleged royalties were paid. The payment of the royalties referred to therefore could in no way be held to show infringement of the patent covering *one* of said *three* inventions. In referring to the alleged royalty book at the argument before this court, plaintiffs' counsel made certain

prejudicial remarks that the defendants had destroyed certain pages of said book. So that this error may be corrected, we refer to the testimony of Mary D. Crookston, former bookkeeper for the Rees Blow Pipe Manufacturing Company (R. 352, 353), in which said witness specifically stated that this book was only a memorandum book, and that when she ceased to need certain data, the pages containing it were destroyed by herself.

**IX. MERE PROOF OF SALE AND MANUFACTURE OF A
DEVICE DOES NOT SHOW INFRINGEMENT.**

Plaintiffs seem to be laboring under the erroneous impression that mere proof of sale and manufacture, or even a showing of such, is all that is necessary to prove the issue of infringement. But the law is to the contrary and we have never discovered a case which even intimated that a mere showing of manufacture and sale would prove infringement. This court is quite familiar with the numerous authorities which undeviatingly hold that, in addition to proof of manufacture and sale, it must be clearly shown that the device complained of embodies each and every of the enumerated elements of the claim relied upon operating in the alleged infringing device according to the same mode of operation as that of the machine of the patent and accomplishing the same result.

It is surely unnecessary to again discuss the various cases set out in our opening brief which are authority for such a simple proposition that mere proof of sale and manufacture of a device, without showing

the construction and operation thereof, does not show infringement.

Therefore, regardless of the proof of manufacture and sale, which we deny, plaintiffs are left in the predicament of not having made the slightest showing of proof that the devices complained of embodied the combination of elements defined in one or more of the twelve claims of the patent in suit, and thus their omission to offer affirmative proof in this regard is fatal to their cause of action. The only possible conclusion to be drawn from this omission of proof is that infringement has not been shown.

X. LICENSE AGREEMENT DID NOT REVEAL CONSTRUCTION OR MODE OF OPERATION OF DEVICES COMPLAINED OF.

Although the license agreement given Neal and Ward was not introduced in evidence, plaintiffs contend that because the testimony shows that said license was *similar*—for it is not contended that it was identical—to the agreement held by the corporation,—an examination of the latter agreement will reveal the construction and operation of the devices upon which the royalty was paid by Neal and Ward and that fact alone creates a presumption of infringement. We have heretofore given some consideration to this license agreement and we shall add only this brief discussion. A quotation from the license to the corporation is set out on page 19 of the supplemental brief, in part as follows:

“a. On each and every such evaporator equipment, made by the Rees Blow Pipe Manufactur-

ing Company, Inc., for the Third Party and sold by such Third Party, \$55.00 for each and every truck capacity thereof and proportionately for any fraction of a truck capacity thereof."

The most significant thing in this connection is that "the evaporator equipment" was previously defined in the license, as explained supra, p. 38, as a machine embodying *any one of three different inventions*, and it is to be recalled that only one of these inventions had been patented, and that the others had progressed no further than pending applications, and as such, under legal rules and decisions, could not support a suit for infringement. The argument is next advanced that because the alleged royalty was paid by Neal and Ward under a similar license agreement, that the reference in the corporation agreement to certain "trays", corresponds more or less with the mention in the specifications of the patent of the "truck on which trays are piled", etc., and that from this infringement would be presumed. This argument is one of the weakest advanced by plaintiffs and deserves little comment. It is sufficient to say that specifications are never the measure of infringement, and that any kind or type of evaporator necessarily has trucks as an integral part of its construction and even though it had been shown that the devices complained of embodied trucks, this would have been no proof or even presumption of infringement. No claim of the patent in suit covers *merely a truck*. They all cover *combinations* of *numerous* elements. In some a truck may constitute *one* of said elements but clearly the presence of *one* such element in a

device, even if proved, would be no proof of the presence of the remaining elements of the combination, all of which are essential to proof of infringement. Plaintiffs say that the inference that the royalty applied to the patented device is "irresistible". Patent litigation is not based nor adjudicated on *inference*, and we know of no case of infringement decided on even the strongest and plainest of inferences.

Further discussion of this feature of the case and of the burden of proof and the failure to sustain that burden by plaintiffs herein, is considered unnecessary in view of the cases and argument set out in our opening brief.

A perusal of the record in this case will convince the reader that although infringement was averred and denied in the pleadings, and that such infringement or no infringement became the essential and primary issue herein involved, that there not only have been no admissions on the part of defendants conceding infringement, but that there has been a total lack of proof in this regard, and that in no way have plaintiffs sustained the burden upon them to affirmatively prove the issue of infringement.

XI. IN AN EQUITY SUIT FOR INFRINGEMENT OF A PATENT THE COURT HAS NO POWER OR JURISDICTION TO AWARD ATTORNEYS' FEES AND THE DECREE APPEALED FROM SHOULD BE REVERSED FOR RESERVING THE RIGHT TO AWARD SUCH ATTORNEYS' FEES TO PLAINTIFFS.

On pages 35 to 37 of their first brief, plaintiffs have attempted to excuse the action of the court below in decreeing that the plaintiffs herein were entitled to reasonable attorneys' fees. The only argument in this connection is that this present suit is not an infringement suit, but is "mainly a stockholders' bill to right a wrong done a corporation and only *incidentally involves infringement* of certain patent rights in which that corporation has an interest." If this is so, then this court, as well as the court below, has no jurisdiction of this case. We do not deny that attorneys' fees may be granted in a stockholders' suit and the only authorities cited in support of plaintiffs' argument all refer to litigation of that type. It is significant that plaintiffs have deliberately avoided discussion of their inconsistent attitude in their supplemental brief. Either this is a suit for infringement of certain patent rights, or it is not. In the one case, the federal courts would have jurisdiction, and in the other, they would not. Plaintiffs, in an endeavor to cover up their trial errors, have assumed both attitudes, and for the purpose of their argument have vacillated back and forth to an astonishing extent.

If infringement was not in issue, how can plaintiffs here argue that they tried to prove and offered proof of it at the trial. Likewise, if infringement was ad-

mitted, why did they try *at all* to prove it. Plaintiffs first assumed the fallacious stand that they could prove infringement by showing mere manufacture and sale, and without proving that the devices made and sold embodied the combination defined in the claims of the patent. They then invented the theory that they did not need to prove infringement, in an attempt to cure this lack of proof, which indeed is admitted on page 31 of their supplemental brief. Forgetful of the question of jurisdiction, they even took the stand that this is not an infringement suit at all, but is an altogether different kind of action. It may only be concluded that their purpose in so doing was to muddy the waters of this appeal so that their own reflection would be unrecognizable.

XII. PLAINTIFFS HAVE FAILED TO SUSTAIN THE BURDEN UPON THEM TO PROVE THAT THE CANCELLATION OF THE LICENSE TO PROGRESSIVE EVAPORATOR COMPANY INC. WAS INVALID AND OF NO EFFECT.

We have discussed at length, in our opening brief, the proposition that plaintiffs have failed to prove that the cancellation of the license to the Progressive Evaporator Company, Inc., was invalid. It is unnecessary to go into a detailed discussion of this point. In answer to this, the plaintiffs have failed to cite a single authority dealing with cancellation of license agreements in an infringement suit. Their main contentions in both briefs are that the royalties were paid to Rees and Hine and thus said defendants had no right to hold that there was a breach of the license

agreement. We believe that this is answered by the memorandum opinion of the court below which conclusively shows that it was never considered that the royalties in full had ever been paid to Rees and Hine.

“In the meantime the Rees corporation presented bills, some of which included dues for royalties as well as for dues for manufacturing, a general balance for all, credits for general payments on account, and a net balance thereof.

In October, however, the bills were changed to segregate royalties from manufacturing, no credits were applied to the former, and all thereof from the beginning appeared therein unpaid. None the less, in cash and purchaser's notes in payment or security, about all due the Rees corporation on both accounts had been received by it from the Progressive corporation; and thereof Rees and Hine had received about \$4,000 and more than half of the total of and for royalties.”

(R. 86.)

Our further point in this connection is that although Lombard well knew the provisions for forfeiture in said license upon the non-payment of royalties, he entirely neglected to insist that any payment of royalties due under the license agreement be specifically made to the persons entitled thereto under said agreement. He was the president and in charge of the affairs of said Progressive Evaporator Company, Inc. during the time when the majority of the royalty payments became due, and had the power and it was his right and duty to see that all payments made by the company were so applied and credited by the persons receiving the same, that none of the rights of the corporation should be jeopardized or endangered. But he was negligent of his duty and

paid no attention whatsoever to these matters, although, in his capacity, he undoubtedly knew of the importance of seeing that such payments were properly made, or otherwise a forfeiture would result. The record is bare of all evidence to show that he even at all asserted himself in this regard, and yet he now is the one complaining of his own negligence. Plaintiffs contend that Lombard could not protect the corporation after he ceased to be president on November 1, 1922, and that after that he could do nothing toward the payment of royalties. But the most significant fact in this regard is that it was Lombard's own act which held up the monies of the corporation until 1923 and from this alone he could have seen, and did see, that the consequence of his harassing action would force a forfeiture. (R. 155, 156, 157.) Plaintiffs further say that the corporation was entitled to a reasonable notice of forfeiture, but this is not so under the precise terms of said license agreement, and moreover Lombard previous to said declaration of forfeiture, had become aware of defendants' intention, but from his own inertia took no steps to see that payments were applied to royalties then due and payable so that the interests of the corporation would be protected.

It may here be noted that plaintiffs have entirely failed to answer our point that for the court below to hold that the Rees Blow Pipe Mfg. Co. and not Rees and Hine, was entitled to give notice of cancellation and effect a forfeiture, was, in effect, to permit the Progressive Evaporator Company, Inc., through which plaintiffs claimed, to deny the title of its licensors,

Rees and Hine, to the inventions in question. The conclusion reached by the court below therefore is not only erroneous on the facts, but contrary to law. We will do no more than again refer to the case of *In re Michigan Motors Specialties Company*, 218 Fed. 377, 379 (p. 39 in our opening brief), which excellently illustrates this point.

XIII. THE FAILURE OF THE PLAINTIFFS TO PROVE INFRINGEMENT REQUIRED A DISMISSAL OF THE BILL BELOW AND NECESSITATES A REVERSAL OF THE DECREE.

On pages 26 to 33 of their supplemental brief, plaintiffs have argued that the bill of complaint should not be dismissed. For this purpose, they have taken the precaution to assume that the manufacture and sale of the patented device was not admitted by the pleadings, and was not conceded at the trial, and that the case was not tried on that theory, and that there was no evidence of infringement based on the two agreements with Neal and Ward. They then say that should it be decided that the "manufacture and sale by the defendants was in issue in this case, was not conceded at the trial and was not shown by the evidence" the proper thing for this court to do would be to send the case back to the lower court for determination of *this one issue*. They further say that had that issue been considered as raised, they "could have proved it beyond a peradventure of a doubt". We are very glad to find counsel so optimistic in this regard, but seriously fear that he is overconfident.

It is further stated in said supplemental brief that:

“every one of the fifty evaporators that were sold in the year of 1923 were exact replicas of the patented device.”

This statement is obviously entirely outside of the record, and should not be considered. There is not one shred of proof in support of this assertion, and furthermore, we are informed that the devices sold were not constructed according to the patent. It is to be noted that counsel then admits that the proof of this question was not fully developed and offers in extenuation of this fatal oversight, the attitude of the defendants themselves. We fail to understand just what plaintiffs expected of defendants or in what degree they would have had defendants instruct them in the trial of their law suit.

We also fail to understand upon what ground the statement is based that:

“it is quite apparent from the record that there is available proof of this point,”

when shortly before, it was admitted that the record does not disclose proof of the question. (p. 31 of supplemental brief.)

In their supplemental brief, on pages 29 and 30, plaintiffs in an attempt to distinguish the cases, as set out in our opening brief, have inadvertently pointed out their direct application to the present case. Plaintiffs note that the court in *Price v. Kelly*, 154 U. S. 669 affirmed the decree because there was *absolutely no evidence of infringement*, and again in the case of *National Casket Company v. Stoltz*, 135

Fed. 535, the court held that there was no evidence of infringement and refused to remand the case for further proof. The same is true in our cited case of *Panzel v. Battle Island Paper Co.*, 138 Fed. 49. We again submit these cases for this court's approval as being directly in point with the present situation and decisive authority for the proposition that there would be no justification for remanding this case for further proof.

In the case of *Weaver Inc. v. American Chain Co., Inc.*, 9 Fed. (2nd) 369, which was a patent infringement suit, on appeal to the Circuit Court of Appeals for the Ninth Circuit, the opinion being rendered by Circuit Judge Morrow, it was held that alleged newly discovered matter was not a ground for granting leave to file a bill of review in the trial court after appeal had been perfected.

The cited case goes much further than the present situation, in that plaintiffs herein do not allege any *newly discovered evidence*, but simply a mass of alleged evidence, which may or may not have existed, but which, if it did exist, was fully accessible to the plaintiffs at the time of the trial. Indeed, if we are to believe counsel's statement that beyond the "peradventure of a doubt" this proof could have been adduced, then, under the rule of the *Weaver* case, *supra*, there is absolutely no basis here for the contention that instead of dismissing the bill, the case should be sent back for further proofs.

We note with amazement one remark of counsel to which we wish to draw attention as it seems to relate

to his alleged appeal to this court upon equitable principles. He says:

“would it be justice then, when the acts of defendants’ counsel lead to this claimed defect in proof to dismiss the case?”

We wish to indicate here that this is the first time that we have ever heard it claimed that counsel, when aware of the opposition’s oversight and omissions at the trial of a lawsuit, should offer suggestions and advice and point out to opposing counsel his trial errors. The sole responsibility for plaintiffs’ failure to prove infringement at the trial of the case at bar rests solely on their own shoulders, and cannot, in any sense, be imputed to the defendants herein.

In view of the authorities to the contrary, we cannot believe that counsel is serious in his contention that this case should be sent back for further proof as to this one issue, in support of which issue not a shred of evidence or proof was adduced. This entire action directly relates to and depends, as does the jurisdiction of this and the court below, upon the issues of infringement. The decree, from which this appeal is taken is essentially based upon the issue of infringement. Therefore, as there is positively no proof of infringement in the record, this decree, in finding infringement, is clearly erroneous and requires reversal.

It is to be recalled that this question of further proof does not involve an examination of the proof of infringement *to see if such proof is sufficient—there is no such proof whatever* in the record to be considered.

The cases cited by counsel have no application to the question herein involved. They all deal with situations where there was first a creditable showing of proof on which to lay other evidence at the rehearing, or, they include determination of questions which are so entirely outside the scope of the present issue that they could have no present application. They thus differ radically from the case at bar wherein there is no proof at all of infringement.

It is to be remarked that counsel has not cited a single case dealing with an analogous situation in an infringement suit. A quotation is taken from 4 *Corpus Juris* 1193, but plaintiffs as usual, have deleted it of any expression dangerous to their own contention. The portion which is set out on page 27 of their supplemental brief, refers exclusively to actions at law and not to equitable actions. Plaintiffs have failed to quote further from the same paragraph as follows:

“the awarding of a new trial on reversal is much more common in actions at law than in actions in equity, this being due in part to the lack of power of an appellate court to determine questions of fact in an action at law and the consequent necessity of a remand for further proceedings where, after reversal, it is necessary to determine questions other than those purely of law.”

The same is true of the quotation from 4 *Corpus Juris* 1199. It will be seen that Section 3239 relates exclusively to actions at law and has no application to equity suits. But inasmuch as counsel has elected to quote therefrom, it might be well to see what is said further on. Thus, 4 *Corpus Juris* 1200, Section 3240, reads:

“However, where there is more than a mere defect of proof, that is, a total failure of proof, there being no legally sufficient evidence of defendant’s liability and the verdict being founded on mere conjecture, the appellate court, on reversal of judgment for plaintiff will not award a new trial.”

The case of *Wiggins Ferry Co. v. Ohio Railroad Co.*, 12 Sup. Ct. Rep. 188, 195, is also cited by plaintiffs. This was an appeal from a final decree dismissing an intervening petition by the plaintiffs in a suit for the foreclosure of a mortgage upon certain property. The facts and the issues of this and the present case are so dissimilar as to warrant no possible analysis.

The case of *Dillingham v. Allen*, 205 Fed. 146, is not in point. This was an appeal from an order sustaining exceptions to a Master’s report advising judgment for plaintiff. The court had sustained exceptions to the Master’s report regarding the value of the timber cut on the theory that the plaintiffs had failed to prove the market value of said timber. Thus, the lack of proof related solely to the measure of damages and in no way can such a ruling be applied to the present infringement suit.

The case of *City of St. Louis v. Western Union Telegraph Co.*, 13 Sup. Ct. Rep. 485, was a suit at law and the court was considering questions of estoppel and the application of ordinances. In no particular can it have any point in common with the present action.

The case of *Exchange National Bank v. New York City Bank*, 5 Sup. Ct. Rep. 141, was also a suit at

law and the court remanded the case, for the reason among others, that there was nothing in the finding of facts on which to base a judgment for any specific amount of damages.

Considering these authorities as a whole, we cannot imagine a class of cases cited in support of a particular argument, which has less application to the issues herein involved. They require no further comment.

XIV. CONCLUSION.

The essence of this action is the issue of infringement. It was upon this theory that the court below took jurisdiction and based its decree.

In this and our opening brief, we have attempted to point out *plaintiffs' total failure* to sustain the burden of proof to establish infringement.

It is therefore respectfully submitted that the plaintiffs have failed to sustain the burden to prove either infringement or any other right to maintain this suit, and that for said reasons and the other errors of law hereinbefore pointed out, the decree should be reversed with directions to dismiss the bill of complaint.

Dated, San Francisco,
June 30, 1927.

Respectfully submitted,

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No. 5051

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAUDE REES, et al.,

VS.

NORMAN LOMBARD, et al.,

Appellants,

Appellees.

PETITION FOR MODIFICATION OF JUDGMENT RENDERED
AUGUST 1, 1927, BY UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

ALEXANDER D. KEYES,
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F. D. KENDRICK



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The judgment of this court was as follows:

“The decree will be modified to exclude relief both injunctive and compensative on account of the two patent applications, otherwise it is affirmed without costs of appeal to either party.”

We respectfully submit that the judgment of this court should be modified to allow and require an accounting from the defendants not only for the infringement of the patent involved in this action *but for all violations of the license agreement incidental to and growing out of such infringement, including the infringement of the inventions embraced within the two applications for patent.* The basis of this court's decree refusing relief on account of the inven-

tions embraced within the two patent applications is stated in the following sentence of its opinion:

“But the court cannot in a suit for infringement of the patent make the contract the primary subject matter of the action and vindicate rights thereunder *which are in nowise involved in or incidental to the question of infringement.*” (Italics ours.)

In our opinion the rule just announced is:

(1) Not applicable to the facts of this case because the rights to the exclusive use of the unpatented inventions vindicated by the decree of the lower court *were involved in and incidental to the infringement of the patented invention*, and

(2) Contrary to the rule established in the federal courts by that line of cases of which *Vogue Co. v. Vogue Hat Co.*, 12 Fed. Rep. 2nd Series, 991, is the latest and best pronouncement, *which holds that if the federal equity court has jurisdiction because the question of infringement of a patent or trade-mark is involved, it can vindicate other rights violated by the same acts which constituted the infringement, even though the rights violated are not patent rights and even though relief for the patent infringement is denied.*

We will discuss these two propositions in the order named. Before doing so, however, we deem it proper to call attention to the fact that these propositions, to which the above quoted portion of this court's decision refers, were not discussed in our brief and in the arguments, and the authorities and facts relating

thereto were not called to the attention of this court. Without the facts about to be related before it, there was nothing to show this court that the infringement of the unpatented inventions, the exclusive right to which the license agreement gave to the corporation, were involved in and incidental to the infringement of the patented invention. It was natural, therefore, without its attention being called to the following facts, that this court should conclude that there was no connection between the infringement of the patented invention and the rights violated by the use of the unpatented invention. The following facts indicate conclusively, however, that there was such a connection and *that one was involved in and incidental to the other.*

I.

PATENTED AND UNPATENTED INVENTIONS EMBODIED IN ONE DEVICE, SO THAT MANUFACTURE AND SALE OF SUCH DEVICE VIOLATED THE CORPORATION'S RIGHTS TO THE UNPATENTED INVENTIONS AT THE SAME TIME IT INFRINGED THE CORPORATION'S RIGHTS TO THE PATENTED INVENTION.

The license agreement gave to the corporation the right to use three inventions covered by three applications for patents. (R. 36, 37.) These applications and the names of the inventions covered thereby are set forth in the license agreement and are as follows:

(a) Application Serial No. 351,538, filed January 15, 1920, for letters patent of the United States *for Drying Apparatus*;

(b) Application Serial No. 429,298, filed December 9, 1920, for letters patent of the United States *for System for Drying Substances*;

(c) Application Serial No. 408,703, filed September 7, 1920, for letters patent of the United States *for Radiator for Drying Apparatus*.

A patent was issued in April, 1922, before this action was brought, on the first application for patent. *Patents were issued on the second and third applications after the commencement of this action.* It can be seen from the mere names given the different inventions, to wit, Drying Apparatus, System for Drying Substances and Radiator for Drying Apparatus, that they are all related to the same thing and all adapted for the same purpose to wit, the drying of vegetables and fruit. *These inventions are all embodied in one device.* This is the device referred to in the license agreement as an *evaporator* (R. 46, 47), and referred to by the parties as plants or as evaporators. (Lombard's Testimony, R. 139; Hine's Testimony, R. 202, 203, 204 and 220.) *This was a device upon which a royalty of \$55.00 a truck capacity thereof was to be paid.* (See: License agreement, R. 48.) In other words the royalty to be paid is not divided up and a portion thereof allocated to each of the inventions, but is a lump sum for a device, which embodied all the inventions both patented and unpatented. The evaporators manufactured and sold by defendants embodied all of these inventions and the royalty that was paid covered not only the patented invention, but also the unpatented inventions. Accordingly the manufacture and

sale of a plant or evaporator by the defendants *not only constituted the infringement of the patented invention but at the same time by the same acts constituted the violation of the defendants' agreement giving the corporation the exclusive use of the unpatented inventions.* Every act, which infringed the patented invention simultaneously violated the license agreement respecting the unpatented inventions. The same controversy, to wit, the validity of the license agreement and the same facts respecting that validity are involved in the violation of the rights of the corporation to the unpatented inventions created by the license agreement as well as they are in the infringement of the patented invention. The conspiracy of defendants to strip the corporation of its license; the attempted cancellation of that license; the manufacture and sale by defendants of the device embodying all these inventions caused both the infringement of the patent and the violation of the corporation's rights under the license to the unpatented inventions. When the defendants did these things they wronged the corporation, first by the infringement of the patented invention and second by the violation of the license agreement, giving the corporation the exclusive right to manufacture and sell the unpatented inventions. The wrong committed was one wrong, but it violated these two different rights in the one act.

Moreover as the patented and unpatented inventions were embodied in the same device an accounting for the infringement of one must of necessity include the others. Any accounting respecting the infringement of the patented invention involves an accounting re-

specting the infringement of the unpatented inventions. It is impossible to say when an evaporator or plant was sold by the defendants what profits the corporation lost and what damage it suffered was attributable to the infringement of the patented invention, as distinguished from the unpatented inventions and vice versa. Therefore, the right to an accounting for the infringement of the patented invention is inextricably involved with the right to an accounting for the infringement of the unpatented inventions. Unquestionably the corporation is entitled to both accountings. It seems a mistake, therefore, to require it to seek an accounting for the infringement of a patent in the federal equity court, which under the authorities it must do, for a federal court has exclusive jurisdiction of patent suits, and to require it to commence another action in another forum based upon the same act or wrong for the infringement of the unpatented inventions, for the same relief, to wit, an accounting for the manufacture and sale of the same devices involved in the accounting in this action. Such a course leads to a multiplicity of suits, and to a circuitous roundabout method of accomplishing a result, which could be accomplished easily and simply by the accounting ordered by the decree of the lower court. Such a course leads to a multiplicity of proceedings to get redress for damages all caused by the same act. Such a course in our opinion is violative of the equitable principle that once a court of equity has obtained jurisdiction of a cause it will give complete relief even though it would not have had jurisdiction to grant that relief if it alone had been sought. (See:

McGowan v. Parish, 35 Sup. Court Rep. 543-548; *Camp v. Boyd*, 33 Sup. Ct. Rep. 785 at page 793; 21 C. J. 134.)

We respectfully submit that it is clearly established that the right of the corporation to redress for the violation by the defendants of its exclusive agreement for the use of these unpatented inventions are involved in and inseparably connected with the right to redress for the infringement of the patent. We submit that the statement of the court in its opinion quoted on page 2 hereof is therefore not applicable to the facts, and that the rights growing out of the contract vindicated by the decree of the lower court are inseparably bound up with and involved in the infringement of the patent, and that the decree of the lower court was not too broad but was proper.

From the record as quoted and from an examination of the license agreement there can be no doubt that the device, to wit, an evaporator or plant sold by the defendants embodied not only the patented invention but the unpatented invention. This is actual fact and can be demonstrated by overwhelming evidence. But if there should be any dispute as to whether or not these unpatented inventions as well as the patented invention were all embodied in the same device and were all necessarily involved in the infringement of the patent and incidental thereto, would it not be better to let the lower court or a master determine this rather than deny the corporation an accounting in connection with the use of these unpatented inventions, when such an accounting is inextricably bound up

with or involved in the accounting for the infringement of the patented invention?

II.

A FEDERAL COURT IN AN ACTION FOR AN INFRINGEMENT OF A PATENT CAN VINDICATE RIGHTS VIOLATED BY THE SAME ACT WHICH INFRINGED THE PATENT ALTHOUGH THE FEDERAL COURT IN AN ACTION BASED SOLELY ON SUCH RIGHTS WOULD NOT HAVE JURISDICTION.

Our second proposition above stated was that the paragraph of the decision of this court quoted on page 2 hereof was contrary to the rule heretofore laid down by federal courts. The latest and best pronouncement of it is in the case of *Vogue Co. v. Vogue Hat Co.* According to this rule established by these cases, *which are known as the patent-unfair competition cases*, the federal courts once having obtained jurisdiction because a patent or trade-mark is involved will retain it to redress other wrongs, besides the infringement of a patent, suffered by the aggrieved party by the same acts which infringed the patent, even though the federal court would not have had jurisdiction in an action solely involving the redress of such other wrongs. The case of *Vogue Co. v. Vogue Hat Co.*, *supra*, was an action for the infringement of a registered trade-mark, brought for that reason within the jurisdiction of the federal court and combined with it was a claim for relief on account of unfair competition. The lower court found against the plaintiff on the infringement of the trade-mark claim,

but found in its favor on the issue of unfair competition, and granted relief on that issue. An appeal was taken and it was claimed that the court had no jurisdiction to grant the relief respecting unfair competition. *Attention is called to the fact that the same acts which constituted the infringement of the trade-mark in that case also constituted the unfair competition. Likewise in the case at bar the same acts which constituted the infringement of the patent constituted the violation of the corporation's rights created by the license agreement respecting the unpatented inventions. The Vogue decision therefore is exactly in point, and it is contrary to the decision of this court in the above entitled action.*

In a splendid opinion the entire question is examined and the various authorities discussed and reconciled. Accordingly we take the liberty of quoting at length parts of this decision. The court stated the question to be discussed as follows:

“That question is, with reference to the rule that a federal court, the jurisdiction of which is invoked between citizens of the same state solely because a patent or registered trade-mark is being infringed, after deciding that controversy against the plaintiff, cannot proceed to give relief upon the ground of unfair competition, whether this rule extends not only to the cases where the patent or registered trade-mark has been held invalid, but to those cases where, though valid, it is found not to be infringed.” (Page 992.)

It is to be noted from the foregoing that in that case the federal court was determining whether or not it still had jurisdiction to grant relief against unfair

competition even though it had determined that there had been no infringement of a trade-mark. In other words even though it had determined the issue of infringement, which originally gave the court its jurisdiction, adversely to the plaintiff, nevertheless it decided that it could retain the case for the purpose of giving relief for the other rights violated. In the case at bar the plaintiffs are in a much stronger position because the issue of infringement has been determined in their favor. If the federal court will redress wrongs arising out of the same acts which it was alleged constituted the infringement even though it finds there was no infringement, a fortiori it should redress wrongs arising out of the same acts which constituted infringement when it is found an infringement was committed.

After stating the question the court then goes on to state the principle that the federal court once having acquired jurisdiction will retain it to dispose of all questions and it says at page 992:

“It is a familiar principle that, when the jurisdiction of a federal trial court is invoked upon the ground that the plaintiff presents a right arising under federal laws, *the court thereby acquires jurisdiction of the case, and it examines and decides all questions involved*, even though the federal question may be resolved against the plaintiff or may be passed without decision.”
(Italics ours.)

In support of this statement it cites two United States Supreme Court cases, *Siler v. L. & N. R. R. Co.*, 29 Sup. Ct. Rep. 451 (213 U. S. 175), and *Davis*

v. Wallace, 42 Sup. Ct. Rep. 164 (257 U. S. 478). In the *Siler* case the court said at page 455:

“The federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, *that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.*” (Italics ours.)

In the case of *Davis v. Wallace* the court said at page 165:

“The case made by the bill involved a real and substantial question under the Constitution of the United States and the amount in controversy exceeded \$3,000. exclusive of interest and costs, so the case plainly was cognizable in the District Court. In such a case the jurisdiction of that court, and ours in reviewing its action, extends to every question involved, whether of federal or state law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case.”

In the case of *Witchita R. & Light Co. v. Public Utilities Commission*, 43 Sup. Ct. Rep. 51 (260 U. S. 48), Judge Taft said at page 53:

“The jurisdiction of the District Court was not limited to federal questions presented by the bill, but extended to the entire suit and every question, whether federal or state, involved in its determination.”

After quoting from these decisions on this rule the court in the *Vogue* case then says:

“It also has been of common observation that, even though the only ground for invoking the reviewing jurisdiction of the Supreme Court over a District Court might have been that a constitutional question was involved, yet the Supreme Court, having the case, decides all the questions in it, *and that no matter whether the claim of constitutional right is sustained or denied.*

“It might seem that the same principle would apply in a suit for patent infringement and unfair competition. The cause of action and the relief sought are each single. In the ordinary case of this type the defendant is selling a specific article. The patentee claims that sale to be a trespass on his rights, and demands an injunction. He has two alternative or combined theories for supporting this single demand for relief. One is that the article sold is within his patent monopoly, and thus wrongfully interferes with his own business; the other is that the article is in deceptive ‘livery’, thus also interfering with his own sales; all he (sometimes at least) wants the courts to do is to stop the sale of that article, thus marked. *So it might be thought that a federal court acquiring jurisdiction of this entire controversy by virtue of the patent question, would proceed to decide all questions involved, no matter how it decided the first one.*” (Page 993.)

After reaching this conclusion it then goes on to discuss certain federal court decisions, which it was contended took a contrary position. The cases chiefly referred to are two, *Illinois Co. v. Elgin Co.*, 94 Fed. 667, referred to in this opinion as the *Elgin* case and the case of *Leschen v. Broderick*, 134 Fed. 571, referred to as the *Leschen* case. Both of these decisions held that the bill could not be sustained unless the federal right was sustained; that if the federal right

was held invalid there was no jurisdiction to hear the remainder of the quarrel between the parties who were citizens of the same state. Even these cases are not opposed to the decision of the lower court in the case at bar. They simply hold that where the issue that gave the court jurisdiction is decided against the plaintiff the court will not hear the remainder of the controversy. *They imply that if the issue, which gave the federal court jurisdiction, is decided in favor of the plaintiff they will then hear and dispose of the entire controversy between the parties even to the extent of vindicating rights not connected with the patent or trade-mark, although violated by the same acts, which constituted the infringement.* Another case referred to is *Geneva Co. v. Karpen*, 238 U. S. 254, 35 S. Ct. 788. In respect to this case they say:

“*Geneva Co. v. Karpen*, 238 U. S. 254, 255, 259, 35 S. Ct. 788, 59 L. Ed. 1295, is also now cited to the same effect; but that case seems to have presented in the end a question of venue rather than of subject-matter. It was in effect held that the restriction of personal jurisdiction over a defendant to the district of his residence (or plaintiff's) was a fundamental protection to him, and hence that the exception permitting him to be sued elsewhere for patent infringement would not be enlarged to permit him to be sued away from home also for something else, even though the two grounds of suit might otherwise be united. The decision cannot well be carried further. If the comment (page 259 (35 S. Ct. 790)), ‘The rule otherwise prevailing respecting joinder of actions in equity cases must, of course, yield to the jurisdictional statute’, *were to be taken at its fullest extent, it would be inconsistent with the rule of the Siler and Davis cases, supra, and that cannot*

Their analysis of the *Geneva* case is undoubtedly correct. It presented in the end merely a question of venue. It cannot be taken and was not intended as an abrogation of the rule of the *Siler* and *Davis* cases. In the case at bar there is a more cogent reason for holding that the court should give complete relief than there was in the *Geneva* case, or in any of the patent-unfair competition cases and that is this: In those cases it was possible to separate the relief to be granted for the infringement of the patent from the relief to be granted for the other rights violated. In the case at bar it is impossible to make such a separation. Damage suffered by reason of the infringement of the patent is inextricably bound up and involved in the damage suffered by reason of the infringement of the unpatented inventions. In other words the rights violated by the infringement of the unpatented inventions are incidental to and involved with the infringement of the patented invention. The existence of this situation in this case is an additional reason why complete relief should be given and why the *Geneva* case is not applicable.

The court then goes on to cite various United States cases, which we will hereinafter refer to, in which it has been held that where the issue of infringement was sustained the court has also given damages for unfair competition. After referring to these cases, in a masterly opinion it proceeds to analyze and dispose of the reasons advanced for the decisions in the *Elgin* and

Leschen cases. Even at the risk of being prolix we quote in part from this part of the decision:

“Three considerations have been suggested for the purpose of reconciling or fairly distinguishing the pronouncement in the *Elgin* and *Leschen* cases and the rule of the *Siler* and *Davis* cases. *The first is that the theory of expansion from one subject to all is a rule of convenience in a court of equity, and cannot be used to supply a lack of jurisdiction.* To this it may be answered, not only that the *Leschen* case was in equity just as much as the *Siler* case, and that the initial incapacity of a federal equity court to consider and grant legal relief is practically equivalent to lack of jurisdiction, but also that the lack of independent jurisdiction in the *Siler*, *Davis*, *Lincoln*, *Green*, and *Watts* cases, to consider and decide non-federal questions, was precisely the same as the lack of initial jurisdiction in the *Leschen* case to consider the unfair competition. Plainly this ground of distinction is not tenable.

“The second one is that in the *Leschen* and similar cases, the two causes of action were distinct, while in the *Siler* and similar cases they were closely related. This is merely the question of multifariousness. It was long ago decided in this circuit that, where the acts complained of were the making and selling of a particular article, the complaint that it was an infringement of a patent and the complaint that it was unfair competition did not make the bill multifarious. *Globe-Wernicke Co. v. Macey*, 119 F. 696, 703, 56 C. C. A. 304. This view has been discussed in some of the cases cited, and it seems to have been sometimes thought (188 F. 734, 242 F. 953) that, if the same acts gave rise to both complaints, jurisdiction might be held for the unfair competition, but not so if the two complaints were respectively based on different conduct by defendant. Indeed, the former view might well be inferred from the assumption stated by Mr.

Justice Holmes in the Stark Case, supra, at page 52 (41 S. Ct. 221); but it is not clear that it could survive comparison with the facts in the Leschen Case. There the use of the colored strand in the rope was the single act which was thought to be both trade-mark infringement and unfair competition; hence this reason for distinguishing is not tenable." (Page 995.) (Italics ours.)

In the case at bar the same acts gave rise to both complaints, that is, to the complaint that the patent invention was infringed, and that the right to the exclusive use of the unpatented inventions were violated. Hence, the reason given in this second consideration cannot apply in the case at bar. The third consideration discussed by the court was that the retention of jurisdiction upon the unfair competition issue depended upon the result reached as to the validity of the patent. This consideration also does not apply to the present case, because in this case the question of infringement has been determined in favor of the plaintiff. After this complete review, which is the best discussion to be found in the authorities on the question, the court then says:

"Accordingly we conclude that since the acts which in this case constitute the claimed infringement of a registered trade-mark and the claimed unfair competition, are, at least in sufficient degree, *the same acts*, and since it is to be assumed that the trade-mark registry was valid, the court had jurisdiction to enjoin the unfair competition, although it had decided that the registered trade-mark was not infringed." (Page 995.) (Italics ours.)

In our opinion this decision is clearly correct law, and is clearly conclusive of the case at bar. It is to be noted that the court there, in its concluding paragraph emphasizes the fact that the same acts which constituted the alleged infringement also gave rise to the other complaints, and accordingly it was called upon to give complete redress for those acts, even though part of that redress was based upon rights which alone it would not have had jurisdiction to vindicate. The following decisions in other jurisdictions sustain the same doctrines announced in *Vogue v. Vogue*, namely, *Ludwigs v. Payson*, 206 Fed. 60, where infringement of a patent was upheld and so damages for unfair competition arising out of the same acts were allowed; *Farmers' Co. v. Beaver Co.*, 236 Fed. 731; *Burns v. Automatic*, 241 Fed. 472, where the same results were reached. (See: Trial court decisions referred to in annotation of *Vogue v. Vogue*, 12 Fed. 2nd Series, 994.)

It cannot be said that the bill of complaint herein did not ask for the relief granted by the lower court. The bill contained a prayer for general relief. (See: R. 26.) It also asked for an accounting for the infringement of the rights of the Progressive Evaporator Company, which rights included not only the infringement of the right to the use of the patented inventions, but also the right to the exclusive use of the unpatented inventions. It is the general rule that a court of equity can give the complete relief, which the facts show is necessary when there is a prayer for

general relief, even though the specific relief given is not mentioned in the prayer. See:

U. S. v. Carter, 30 Sup. Ct. 515, 217 U. S. 286;

35 L. R. A. (N. S.) 543;

Missouri etc. R. v. Murphy, 90 Pac. 290, 75 Kan. 707;

Bells Estate v. St. Johnsbury etc. R., 81 Atl. 630, 85 Vt. 240.

RECAPITULATION.

Accordingly, we submit, first, that the corporation is entitled in this action to an accounting for violation of its rights to the exclusive use of the unpatented inventions given it by the said license agreement as well as an accounting for the infringement of the patent, as the one is involved in the other, and as they arise out of the same acts and wrongs of the defendants; second, that this is the established rule of the federal court, and to hold otherwise would be in conflict with the established principle set forth in the *Vogue* case; third, that if there is any doubt or dispute that the unpatented inventions are all embodied in the evaporators manufactured and sold by the defendants in violation of the corporation's rights, this question should be given to the master or the lower court to determine.

We respectfully submit that the judgment of this court in this action should be amended to require the defendants to account for the infringement of the unpatented as well as the patented inventions embodied

in the plants and evaporators sold by them in violation of the corporation's rights.

Dated, San Francisco,
August 29, 1927.

Respectfully submitted,

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IN THE
United States Circuit Court
of Appeals

FOR THE
NINTH CIRCUIT

CLAUDE REES, CHARLES F. HINE, REES BLOW
PIPE MANUFACTURING COMPANY, INC. (a
corporation), and PROGRESSIVE EVAPORATOR
COMPANY, INC. (a corporation),

Defendants-Appellants,

VS.

NORMAN LOMBARD, MONTGOMERY FLYNN,
WILLIAM T. ECKHOFF, NORMAN LOMBARD
and ELLEN LOMBARD, Trustees for Ellen
Lombard, Elizabeth Lombard and Norman
Lombard, Junior.

Plaintiffs-Appellees.

Reply to Petition for Modification
of Judgment

WILLIAM K. WHITE,
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Lombard, Elizabeth Lombard and Norman
Lombard, Junior.

Plaintiffs-Appellees

REPLY TO PETITION FOR MODIFICATION
OF JUDGMENT

Appellees' petition for modification of the judgment of this court herein, takes exception to that portion of the court's ruling which directs elimination from the decree of both injunctive and compensatory relief for

so-called infringement of the two pending applications for patents referred to in said decree. The reasons and necessity for such ruling are clearly and correctly set forth in the opinion of the court herein and are in accordance with the law in this circuit as heretofore declared by this court.

Columbia and N. R. R. Co. vs. Chandler, 241
Fed. 261, 263. (C. C. A. 9th.)

In view of these circumstances, a brief in reply to appellees' petition is not justified. It may be helpful to the court, however, to point out that in various respects the propositions urged in said petition are premised upon alleged facts outside the record herein so that such propositions are necessarily untenable.

The substance of the entire argument in the petition is that:

(a) the devices complained of, and which the trial court found infringed the patent in suit, also embodied the two inventions respectively covered by the applications; that

(b) sale of such devices therefore violated appellees' alleged rights in said applications; that

(c) such violation of said alleged rights was therefore incidental to and grew out of the infringement of the patent and therefore that

(d) relief should be given in this one suit for such violation as well as for infringement of the patent irrespective of the question of federal jurisdiction over the alleged cause of action with respect to the applications.

The whole argument above manifestly is founded upon the premise (a), supra, to the effect that the de-

vices complained of embodied *both the invention of the patent and also the inventions of the two applications.*

The alleged facts of said premise nowhere appear in the record herein. Said record is wholly devoid of any finding or of any evidence that such *three* inventions, that is, of the patent and of each of the two applications, were embodied in the devices complained of. On the contrary, the only finding of the court below in this regard shows that said devices *only embodied the patented invention, if any.* The trial court said:

“Thenceforward, plants of *the patent* by the licensees or licensors or both have been manufactured and sold.” (R. 87.)

Clearly, if “plants of the *applications,*” to use the trial court’s form of expression, had been made or sold, the court would have so found and would not have limited the statement in its opinion to “*plants of the patent.*” In this respect the court’s finding was in accord with the prayer of the bill as pointed out in this court’s opinion herein.

Appellees further assert (Petition p. 4) that the license agreement provided that royalty was payable on devices embodying *all three* inventions and that therefore all three inventions were embodied in the devices complained of.

Here again the record is to the contrary. The agreement recited that said devices embodied “the said inventions, *or some of them.*” (R. 38.)

It granted a license with respect to “devices embodying said inventions *or some of them*” and it was on

"said devices" (R. 48) so embodying *any one* of the three inventions that royalties were payable. The license agreement therefore is no evidence whatsoever that the devices complained of embodied any more than *one* of the three inventions in question.

The above is sufficient to show that the premise upon which the whole argument of the petition is founded is based entirely upon *assumed facts not in the record*.

It follows that appellees' contention that infringement of the patent necessarily comprised manufacture and sale of devices embodying the inventions of the applications is untenable. Likewise it follows that such so-called infringement of the applications is not incidental to infringement of the patent and therefore appellees' sole basis for their contention that the federal court could grant relief as to all appellees' claimed rights, both with respect to the patented and unpatented inventions, must fall because based upon alleged facts not in evidence. Said last contention also is conclusively answered by this court's ruling that the trial court had no jurisdiction to grant any relief with respect to alleged rights in the unpatented inventions.

There is a further and equally conclusive answer to the same contention. Irrespective of the question of jurisdiction, *no court, state or federal*, has the power to grant the relief sought as to the applications. As this court has clearly held in its opinion, there is no property and there are no rights in an unpatented invention which can be injured or violated and therefore no relief can ever be awarded for any such alleged injury or violation. Appellees have cited no case and we have not

been able to find any case in which any court, *state or federal*, has granted relief such as appellees here seek with respect to the unpatented inventions. Surely, such authority would have been cited on behalf of appellees if any such could be found.

On the contrary, appellees cite cases which by their very inapplicability demonstrate the absence of authority to substantiate their contentions. The cases so cited, of which *Vogue Co. vs. Vogue Hat Co.*, 12 Fed. (2nd) 991 is one, are merely illustrative of one of two conflicting lines of authority. They deal with situations where two recognized causes of action are alleged in one bill, one for patent infringement and one for unfair competition. The question arises in such cases whether a federal court, having jurisdiction of the patent issue, can also award relief on the unfair competition issue of which it would otherwise have no jurisdiction. The best reasoned cases deny such power to grant relief on the issue of which it would not otherwise have jurisdiction. See the following cases, from which we quote only the pertinent syllabi:

“A federal court is not given jurisdiction of a suit for unfair competition between citizens of the same state by the fact that it is joined with a cause of action for infringement of a patent, nor because the unfair competition charged is connected with the sale of the alleged infringing articles.”

Unit Const. Co. vs. Huskey Mfg. Co., 241 Fed. 129.

“A bill, alleging infringement of a patent in the manufacture and sale of filters and unfair competition in selling filters, and praying for an injunction

restraining the infringement and the sale of filters in the types of packages complained of, is demurrable, where both parties are citizens of the same state, on the ground that the court has no jurisdiction over the unfair competition”;

Johnston et al. vs. Brass Goods Mfg. Co., 201 Fed. 368.

“Unfair competition in trade is not a federal question, and a suit therefor is not within the jurisdiction of a federal court, where the parties are citizens of the same state; nor is that issue drawn within such jurisdiction because the bill also alleges infringement of a patent growing out of the same acts of defendant.”

Mecky vs. Grabowski et al., 177 Fed. 591.

“A bill to restrain the infringement of a patent, which thus presents a Federal question, does not draw within the jurisdiction of the Circuit Court a further issue as to unfair competition in trade, although it grows out of the same acts of defendant; the two causes of action being independent of each other.”

Cushman vs. Atlantis Fountain Pen Co. et al., 164 Fed. 94.

“A complainant in a federal court cannot join with a cause of action for infringement of a patent one for unfair competition in trade, although both relate to the same subject-matter, where there is no allegation of diverse citizenship to give the court jurisdiction of the second cause.”

C. L. King & Co. vs. Inlander, 133 Fed. 416.

We have here, however, no such situation. No cause of action for unfair competition or any cause of action

whatever is attempted to be set forth in the bill herein except that for *infringement of the patent and of the applications*. In this suit, therefore the relief sought in addition to that for patent infringement is not upon a recognized cause of action as in the cases cited by appellees but is of a sort which no court, has ever, or can ever grant, because as stated, there are no rights or property in an unpatented invention which can be violated or afford ground for any relief.

Columbia and N. R. R. Co. vs. Chandler, 241
Fed. 261, 263 (C. C. A. 9th).

It is respectfully submitted that insofar as the ruling of this court modifies the decree herein, it is fully in accord with the authorities and that the judgment herein in that respect should not be modified.

San Francisco, September 14, 1927.

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